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CURRENT EVENTS.

ILLEGAL EVIDENCE.—THE JACOB SHARPE CASE—The New York Court of Appeals has shown "the courage of its convictions," and granted a new trial in the Jacob Sharpe case. And now we presume it must undergo the ordeal of "trial by newspaper." This sort of proceedure, as we have heretofore said, we regard as eminently proper and salutary, and as we now consider those eminent jurists as fairly before a court of competent jurisdiction, we can only say to them in the kindly language used in ancient arraignments: "May God send you a good deliverance."

Not having as yet seen the opinion of the court, we cannot, of course, comment upon its reasoning or the justice of the conclusions to which it has arrived. We improve the occasion however by expressing our views on the subject of illegal evidence. The popular clamor against "mere technicalities is usually very absurd. It means that the proceedure in question or the conclusion arrived at does not accord with the prejudgment of the critic. In all systems of human law there must needs be technicalities, "mere" or otherwise. There are technicalities *and* technicalities. One class relates to the *minima* of the law, and are in proper cases disregarded by the courts; another class controls the proceedure of courts in the administration of justice, and are as important as the vital principles of the law which they regulate. Of these the law of evidence is the most conspicuous example. Every person accused of crime has a right to be tried, and acquitted or convicted upon a full hearing of "the truth, the whole truth, and nothing but the truth," as far as the imperfections of all human institutions permit the truth to be presented. The rules of evidence control this all important subject, admit that which is true, or probably true, and exclude that which is false, or probably false. They are necessarily general, and it must needs happen that sometimes falsehood is admitted and that truth is excluded under their operation. As they are of merely human origin, they are of course imperfect, but such as they are, they have been proved by the experience of ages the best safeguards of life, liberty and property, that have ever been devised by human wisdom. From time to time, and especially of late years, these rules have been amended, chiefly in the direction of admitting classes of evidence excluded by the policy of the old law, and it may well be believed that such evidence as is excluded by the existing laws ought to be excluded. The whole subject has been thoroughly canvassed by legislative bodies in England, and in all the American States, incompetency by reason of interest has been extinguished, incompetency by reason of domestic and confidential relations has been much attenuated, and there is now little of any consequence, still excluded except such as are dependent npon hearsay; that in which the party to be affected has not had the opportunity to cross-examime the witnesses, or otherwise to controvert their testimony, and documentary evidence imperfectly authenticated. We presume that nobody would advocate the admission of these classes of evidence, and yet their exclusion often produces hard cases and affords occasion for the charge that the rule of law which excludes them is "mere" technicality, unworthy of an enlightened court of justice.

We regard the strict enforcement of the rules of evidence as the highest, most critical and most important of judicial duties. Unless the truth is known justice cannot be done. Unless the falsehood be excluded as completely as human weakness will permit, the truth essential to the due administration of justice cannot be known.

No branch of the law less deserves the depreciatory appellation of "technicality" than the law of evidence, and to none can the minimizing adjective "mere" be less appropriately applied.

To return to the New York Court of Appeals and the Jacob Sharpe case: Whether that notable person be guilty or innocent is a question of the least possible moment as compared with the question whether in his case the law had been properly administered. The court has decided that it was not, and for this decision, in the face of a pronounced

adverse public sentiment, the judges, one and all, deserve a eulogium upon their fidelity, wisdom and courage, which cannot be so well expressed as in the words of the greatest of Latin poets:

> *"Justum et tenacem propositi virum,*
> *Non civium ardor prava jubentium*
> *Non vultus instantis tyrani*
> *Mente quatit solida—"*

NOTES OF RECENT DECISIONS.

MORTGAGE—EQUITY OF REDEMPTION—MERGER—ESTOPPEL.—The Supreme Court of New Hampshire, recently decided a case [1] settling the rights of a mortgagee who had purchased the mortgager's equity of redemption and thus united in his own person the entire title to the property. The facts were that after the execution of the mortgage the mortgagor became insolvent, and his assignee in insolvency under the laws of New Hampshire, sold all the property of the mortgagor and among other things his equity of redemption in the land mortgaged. This was bought at merely a nominal price by the mortgagee, who believed it to be a cheap and convenient method of foreclosing his mortgage. The debt was secured also upon certain lands in Massachusetts. A writ of entry was brought to foreclose the mortgage on the New Hampshire lands. The court held that union of the title in the person of the mortgagee did not operate to extinguish the debt, saying: "For the puposes of this case it is agreed that the value of the Massachusetts lands was much less than the amount of the mortgage debt, and that the plaintiff purchased the equity of redemption for a nominal sum at the auction sale by the mortgagor's assignee in insolvency, 'because he believed that to be the least expensive way of foreclosing his mortgage.' Under these circumstances, and as against those lands, the union of the titles of the mortgagor undoubtedly became perfected in the latter, and his remedy exhausted; but the mortgage debt was neither satified in fact, nor extinguished in law. To hold otherwise would obviously be inequitable, and in such case it is held that the union of titles will not, of itself, be considered a merger, so as to operate as payment or satisfaction of the mortgage debt; and this is the rule both at law and in equity. Walker v. Baxter, 26 Vt. 710. To the extent of the value of the property acquired at the time when the mortgagor's right therein was extinguished, the plaintiff's mortgage debt is to be regarded as satisfied, and his mortgage lien released, but no further. A foreclosure upon that property whould have had this effect. Smith v. Packard, 19 N. H. 557; Green v. Cross, 45 N. H. 574; Fletcher v. Chamberlin, 61 N. H. 438. 2 Jones, Mortg. § 950; And no reason is perceived why the purchase of the mortgagor's equity should not have the same effect. The process of foreclosure is only one of the ways and remedies of a mortgagee to obtain an absolute title to the property. Among others he may obtain such title by becoming the purchaser of the equity of redemption at a sale by the mortgagor's assignee in insolvency, or on execution, either of which may often be a convenient and inexpensive mode of procedure; and as the law gives the mortgagor the same right to redeem from a sale as from a foreclosure, and imposes the same accountability for rents and profits upon the mortgagee, there would seem to be no difference in principle between the one mode and the other, in respect of the mortgage debt; and we are of opinion there is none. Such, also, is the weight of authority. 'The purchase of the equity of redemption by the mortgagee, at a sale by the mortgagor's assignee in insolvency, or an execution, is not at law a satisfaction of the mortgage debt, and the mortgagee is not estopped from claiming that the property is of less value than the amount of the debt.' 2 Jones Mortg. § 950. Murphy v. Elliott, 6 Blackf. 482; Johkson v. Watson, 7 Blackf. 174; Speer v. Whitfield, 10 N. J. Eq. 107; Lydecker v. Bogert, 37 N. J. Eq. 136; Walker v. Baxter, *supra*; Findlay v. Hosmer, 2 Conn. 350; Post v. Tradesman's Bank, 28 Conn. 420. And see Marston v. Marston, 45 Me. 412; Puffer v. Clark, 7 Allen, 80; Spencer v. Harford, 4 Wend. 381; and Hatz's Appeal, 40 Pa. St. 209. The plaintiff may, therefore, maintain this action, and if no other means are or have been taken to ascertain the value of the Massachusett

[1] Clark v. Jackson, S. C. N. H., July 15, 1887; 11 Atl. Rep. 56.

lands embraced in his mortgage, it may be proved on the trial under the plea of *nul disseizin*. Green v. Cross, *supra*."

SISTER STATE CORPORATIONS.

§ 4. *Stockholders' Meetings.*—It is sometime said in text books and judicial decisions without qualification, that action taken at a stockholders' meeting held outside the territory of the chartering State is void.[1] The rule may be supported by the argument, that, to allow stockholders' meetings beyond the territorial limits of the chartering State would deprive the State of control over the corporation and renders it irresponsible, and would enable the managers or a majority of the stockholders to oppress the minority by appointing places of meeting inconvenient and difficult to reach. One court, putting an extreme case, says, that if meetings may be held at places without the chartering State, they can be held in Russia, China or Japan, or in each of those countries in succession.[2] In spite of the support of respectable authorities and of the arguments just mentioned, the rule standing unqualified, is an inaccurate statement of the law.

It is a settled principle of constitutional law that the legislative power of a State legislature within its territorial jurisdiction is unlimited, except by the United States constitution and the constitution of its own State. There is nothing in the Federal constitution, nor in the ordinary provisions of a State constitution, which forbids a legislature to authorize a corporation to hold meetings of its members beyond the limits of the chartering State, subject to the consent, express or implied, of the government of the place at which meetings are held. I conclude, therefore, that a stockholders' meeting, held pursuant to the charter of the corporation, beyond the limits of the chartering State and within another State of the Union, with the express or implied consent of the latter State, is valid in all jurisdictions.

In the absence of any statutory provision to the contrary, a meeting in one of several States of the stockholders of a corporation, chartered by all those States, is valid in respect to the property of the corporation in all of them, without the necessity of a repetition of the meeting in any other of those States.[3] This rule supports the proposition, before contended for, that a State may authorize a stockholders' meeting to be held in a sister State with the permission of the latter. It shows that a valid stockholders' meeting may be held without the chartering State, under certain circumstances which make such a course convenient, where the chartering State does not expressly forbid such meeting. If such a meeting may be held when merely not forbidden, it would seem that it may be so held when expressly authorized.

Where the charter of a corporation is silent as to the place of holding meetings of the members, the rule that corporate meetings must be held within the chartering State is, probably, generally applicable.[4] One exception subsists, as we have seen, in the case of a corporation chartered by more than one State. Perhaps another exception subsists where all the stockholders agree to hold a meeting outside of the chartering State, or ratify one so held, for it is a rule of law that provisions of a charter, which are enacted by the legislature for the sole benefit of the shareholders or of the corporation, may be waived by them respectively.[5] The uncertainty arises from a doubt whether the implied requirement, that corporate meetings be held in the chartering State, is enacted solely for the benefit of the shareholders. In Maine, it has been held that a domestic corporation may adopt at a meeting held within the State the action of a meeting held previously outside of the State.[6] In Colorado, it has been decided that a corporate meeting held without the State, under a charter, which did not fix the place for corporate meetings, although irregular, was not void and that its validity

[1] Miller v. Ewer, 27 Me. 509; Ang. & Ames on Corps. (11 ed.), §§ 493, 104, and cases there cited; Morawetz on Corps. (1 ed.), § 364, modified however in 2d. ed., § 488; Redfield on Railways, vol. 1, pp. 56, 57, *Accord:* Bank of Augusta v. Earles, 13 Pet. 519.

[2] Aspinwall v. O. & M. R. Co. (1863), 20 Ind. 492.

Graham v. B. H. & E. R. Co., 118 U. S. 161; Covington Bridge v. Meyer, 31 Ohio St. 317.

[4] Consult Ang. & Ames on Corps. (11 ed.), §§ 104, 493; Morawetz on Corps. (2 ed.), § 438; Aspinwall v. O. & M. R. Co., 20 Ind. 492.

[5] Morawetz on Corps. (2 ed.), §§ 672, 674, 490.

[6] Bradbury v. Brides (1854), 38 Me. 346.

could not be questioned in a collateral proceeding, *e. g.*, in a suit by a creditor of the corporation to charge several stockholders as partners.[7]

A stockholders' meeting, held outside of the limits of the chartering State without its consent, may be rendered valid, so far as a charter consent can make it valid, by subsequent ratification by the State.[8]

A stockholders' meeting, held in accordance with a statute of the chartering State, at some place in a sister State, but in violation of the law of the latter or for a purpose or under circumstances inconsistent with the public policy of that State, is probably void everywhere. The courts of the State in which the meeting occurred certainly would so treat it.[9] The Federal courts and the courts of the chartering State would probably treat it as void also. The law of the chartering State can have no extraterritorial force except by adoption by the local government.[10]

The conclusions of the writer concerning the validity of corporate meetings held in a State other than the chartering State are confirmed by the views of the United States Supreme Court, delivered *arguendo*, where the question before the court was, whether the public policy of a certain State rendered invalid a conveyance of land in it to a sister State corporation. The court said: "Although, as a general proposition, a corporation must dwell in the State under whose laws it was created, its existence as an artificial person may be acknowledged and recognized in other States. In harmony with the general law of comity obtaining among the States composing the Union, the presumption should be indulged that a corporation of one State not forbidden by the law of its being, may exercise within any other State the *general powers conferred by its own charter*, unless it is prohibited from so doing either in the direct enactment of the latter State, or by its public policy."[11]

The doctrine of estoppel may, in some cases, prevent one from relying upon the invalidity of a corporate meeting held outside of the chartering State, *e. g.*, one who has subscribed for stock of the corporation and paid for it in part cannot set up the invalidity of such a meeting at which the corporation was organized, to avoid paying the balance.[12]

§ 5. *Suits By and Against Sister State Corporations.*—For the purpose of suing and being sued in the Federal courts, it is well known that a corporation is now deemed a citizen of the State which chartered it.[13] Under the Federal constitution and statutes therefore, where the amount in controversy is sufficient to allow it, a corporation chartered by one State may sue in the Federal circuit court for any other State a citizen of that State, on the ground of diversity of citizenship of the parties. The jurisdiction of the court is not defeated by the fact, that the plaintiff corporation operates a railway in the State where it sues under a license from that State not amounting to reincorporation.[14] When a corporation is chartered by several States, the question arises to which of the chartering States to refer its citizenship. From the decisions of the United States Supreme Court it seems probable that a corporation chartered by States A and B cannot sue a citizen of State B in a Federal court for the latter State on the ground of diversity of citizenship of the parties.[15] This conclusion follows from the principle before stated,[16] that a corporation chartered by several States is in each State a domestic corporation of that State. A sister State corporation may bring suit in the Federal court for a State, although forbidden by the laws of the State to transact business within its limits.[17] This decision is founded on the principle that a State cannot deprive a citizen of another State of the

[7] Humphreys v. Mooney (1880), 5 Colo. 282.
[8] Graham v. B. H. & E. R. Co., 118 U. S. 161, 170.
[9] Land Grant R. & T. Co. v. Coffee County, 6 Kan. 245; Hill v. Beach, 1 Beas. (N. J.) 31.
[10] Middle Bridge Corp. v. Marks, 26 Me. 326.
[11] Christian Union v. Yound (1879), 101 U. S. 352.
[12] Ohio & M. R. Co. v. McPherson, 35 Mo. 13.
[13] Kansas Pacific R. Co. v. Atkinson R. Co., 112 U. S. 414.
[14] Penn Co. v. St. L., etc. R. Co., 118 U. S. 290.
[15] Ohio & M. R. Co. v. Wheeler (1861), 1 Black, 286; Memphis R. Co. v. Ala. (1882), 107 U. S. 581, remarks *arguendo*, p. 585. But see limitation of O. & M. R. Co. v. Wheeler, in B. & O. R. Co. v. Harris, 12 Wall. 65. Decisions contrary to text have been rendered in the inferior courts since O. & M. Co. v. Wheeler was decided: Nashua & L. R. Co. v. B. & L. R. Co. (1881), 8 Fed. Rep. 458; s. c. (1884), 19 Fed. Rep. 804.
[16] § 1 of this article, Cent. L. J.
[17] Northwestern Mut. Life Ins. Co. v. Elliott, 5 Fed. Rep. 225. *Accord:* Brown v. Burnside, 121 U. S. 186.

right to sue in a national court. By the law of comity a sister State corporation, like any foreign corporation, may sue in the courts of a State unless forbidden to do so by its laws.[18]

By the early common law, a corporation could not be sued beyond the State which created it,[19] unless it voluntarily appeared.[20] In St. Clair v. Cox, just cited, the United States Supreme Court state the former law as follows: "Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the State by which it was chartered. * * There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were therefore necessarily confined to the disposition of such property belonging to it as could there be fonnd, and to authorize them legislation was necessary." It is still the law in many States that a foreign corporation can be brought into court against its will only by statutory provision.[21] The inconvenience resulting from this rule is now much lessened by the existence in many States of statutory provisions to compel the appearance of foreign corporations and to reach their property within the jurisdiction. Where a foreign corporation acts in a State without complying with a statute requiring the appointment of an agent to receive service of process, process against it may be served upon the agent by whom it does act.[22] A corporation of one State is "found" in another State, within the meaning of the statute governing the jurisdiction of the Federal courts, when such corporation has appointed an agent there, to receive service of process in compliance with the laws of the latter State,[23] or when it acts in another State with the express consent of the legislature of that State, it being deemed an implied incident of such consent that the corporation may be sued there,[24] or when it has there an established office.[25] In some States it is now held that a sister State corporation is found within the State for the purpose of service of process whenever it does business there.[26]

It follows from the doctrine, that a corporation chartered by two States is in each a domestic corporation, that such a corporation may be sued on the ground of diverse citizenship in the Federal courts of either State by a citizen of the other.[27] And if sued in a State court of either chartering State by a citizen of the other chartering State, it may remove the cause to a Federal court on the ground of diverse citizenship, if such relation is a statutory cause for removal;[28] but if sued in a State court of either chartering State it cannot remove the cause to a Federal court on the grounds that it is a citizen of the other State.[29] And a corporation chartered by two States cannot be sued in a Federal court of either State by a citizen of that State on the ground of diverse citizenship.[30] But a sister State corporation operating a railway in a State under a lease from a domestic corporation, if sued by a citizen of the State may remove the suit into a Federal court, on the ground that the citizenship of the parties is diverse.[31] The appointment by a sister State corporation of an agent within the State where it acts to receive service of process, does not deprive it of the right to remove to a Federal court a suit brought against it in the latter State by a citizen of that State.[32] The rule, that the citizenship of each of the plaintiffs must be diverse from that of each of the defendant's, in order to authorize the

[18] Morawetz on Private Corps. (2d ed.), § 961 *et seq.*

[19] St. Clair v. Cox, 106 U. S. p. 354; Middlebrooks v. Springfield Fire Ins. Co., 14 Conn. 301.

[20] Dart v. Farmers' Bank, 27 Barb. (N. Y.) 337. *Accord: Ex parte* Schollenberger, 96 U. S. 337.

[21] Middlebrooks v. Springfield Fire Ins. Co., *supra;* Sullivan v. La Crosse Packet Co., 10 Minn. 386; Boston Electric Co. v. Electric Gaslight Co., 23 Fed. Rep. 838.

[22] Funk v. Anglo-American Ins. Co., 27 Fed. Rep. 336.

[23] *Ex parte* Schollenberger, 96 U. S. 369; New England, etc. Ins. Co. v. Woodworth, 111 U. S. 138; Gray v. Quicksilver Mining Co., 21 Fed. Rep. 288.

[24] B. & O. R. Co. v. Harris, 12 Wall. 65.

[25] Block v. Atkinson, etc. R. Co. (1884), 21 Fed. Rep. 529.

[26] Hannibal & St. J. R. Co. v. Crane, 102 Ill. 249; Mock v. Virginia, etc. Ins. Co., 10 Fed. Rep. 696, and cases there cited.

[27] Muller v. Dows, 64 U. S. 444.

[28] Chicago, etc. R. Co. v. Whitton (1872), 13 Wall. 270.

[29] Memphis, etc. R. Co. v. Alabama, 107 U. S. 581; Marshall v. B. & O. R. Co., 16 How. 314.

[30] Stout v. Sioux City, etc. R. Co., 8 Fed. Rep. 794.

[31] R. R. Co. v. Koontz, 104 U. S. 5. *Accord:* Goodlett v. Louisville, etc R. Co., 122 U. S. 391.

[32] New England, etc. In Co. v. Woodworth, 111 U. S. 138.

removal of a cause from a State to a Federal court, applies to suits in which a sister State corporation is a party. Thus, a suit in a State court by a domestic citizen against a sheriff and an intervening sister State corporation, cannot be removed to a Federal court by the latter on the ground of diversity of citizenship.[33]

The fact that a cause of action against a sister State coporation arose out of the State in which suit is brought, is no defense,[34] in the absence of statutory provisions making it one.

In some States, statutes of limitation do not run in favor of sister State corporations. Where a State statute of limitation as construed by its highest court does not run in favor of a sister State corporation, the United States Supreme Court will follow the construction adopted by the State court,[35] although such corporation is the lessee of a railway in the State, has property in the State, and has a managing agent residing within the State, and keeping an office there.[36]

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[33] Thorn Wire Hedge Co. v. Fuller, 122 U. S. 535.
[34] Railroad Co. v. Harris, 12 Wall. 65; New England Ins. Co. Woodworth, 111 U. S. 138.
[35] Mining Co. v. Taylor, 100 U. S. 37.
[36] Tioga R. v. Blossburg, etc. R., 20 Wall. 137.

CORROBORATION IN PERJURY.

It may perhaps not be out of place at the present time to notice briefly some of the points which become important in determining the sufficiency of the testimony required to corroborate that of the prosecutor in a charge of perjury so as to satisfactorily disprove the truth of the matter sworn to by the defendant, and upon which perjury has been assigned against him. The general rule is clear and distinct, and is to the effect that the testimony of a single witness is *per se* insufficient to convict a person of the offense of perjury. It would then be a case of oath against oath, and although the defendant might be known to bear a most disreputable character, or even to have been previously convicted of perjury, yet if the prosecutor's evidence stands alone, however worthy of belief that evidence might be, no conviction of perjury could take place.

It is not, however, to be inferred from this rule of evidence that in every case there must be the sworn testimony of at least two witnesses in order to disprove the fact sworn to by the defendant, but it has been held sufficient in order to turn the scale in favor of the prosecution that some substantial matters shall be proved by other witnesses by confirmation of the witness who gives the direct testimony of perjury—"one witness in perjury is not sufficient unless there be support given to his evidence by circumstantial evidence of the strongest kind." It was said by Erle, C. J., in R. v. Shaw,[1] "It is well ascertained law, that upon an indictment for perjury, it is necessary to have the evidence of more than one witness alone, for that is but the oath of one against one which leaves the matter even, and entitles the prisoner to an acquittal. The prosecution must do more than that. They must turn the scale by corroborating their own witness. The degree of corroboration, however, which is necessary, is not determnable, and any attempt to define it will prove illusory. It must be something which, in the opinion of the tribunal before which it is brought, is deserving of the name of corroboration. There must be something in the corroboration which makes the fact sworn to by the defendant not true, if that be true also." The instances in which the corroborative evidence adduced has been held to be sufficient or insufficient as the case may be, are very numerous, and, as each case depends upon its own peculiar circumstances, to mention the instances would be unprofitable, yet there is one description of perjury in which some difficulty of proof is often experienced by the prosecution, namely, those cases in which the defendant himself has made two inconsistent statements upon oath. The case of R. v. Jackson,[2] is an illustration of this class of perjury, and in that case it was said by Holroyd, J.: "Although you may believe that on the one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury; for there are cases where a person might very honest y

[1] L. & C. 90.
[2] Lewin C. C. 270.

and conscientously swear to a particular fact, and from other circumstances, be subsequently convinced that he was wrong and swear to the reverse without meaning to swear falsely either time." Upon this question of inconsistent statements made by the defendant, the following may be usefully quoted from Alison's Principles of Criminal Law: "Where depositions contrary to each other have been emitted in the same matter by the same person, it may be certainly concluded that one or the other is false. But it is not relevant to infer perjury in so loose a manner; the prosecution must go a step further, and specify distinctly which of the two contains the falsehood, and peril his case upon the means he possesses of proving perjury in that deposition. It is now justly considered indispensable that the perjury should be specified as existing in one and the other deposition referred to *in modum probationis* to make out, along with other circumstances, where the truth really lay." The evidence, then, of one witness, together with the statement by the defendant, inconsistent with the evidence upon which perjury is assigned against him, and supporting the testimony given by that witness, or in other words, the contradiction by the prisoner himself, and the contradiction of an independent witness who speaks to the falsehood of the fact, together constitute the two contradictions, on oath independent of one another which are required to warrant a conviction of perjury.—*Justice of the Peace, England.*

SCCHOOL LANDS—TITLES — SWAMP LANDS — RIPARIAN RIGHTS.

TRUSTEES OF SCHOOLS V. SCHROLL.

Supreme Court of Illinois, May 12, 1887.

1. *School Lands—Title—Swamp-land Act.*— Section numbered 16 in every township having been granted to the State for the use of the inhabitants of such township for the use of schools by the enabling act of congress, April 18, 1818, and the act having been formally accepted by one ordinance of the constitutional convention of Illinois, August 26, 1818, the State became thereby the purchaser for a valuable consideration of such school sections and they were no longer public lands nor could they be regarded as unsold lands, within the meaning of the act of congress of September 28, 1850, enabling certain States to reclaim unsold swamp lands.

2. *Riparian Rights — Streams —Lakes or Ponds.*— Grants of land bounded on streams or rivers above tide-water carry the exclusive right and title of the grantee to the center of the stream, subject to the easement of navigation in navigable streams, unless the terms of the grant clearly denote the intention to stop at the margin of the stream; but when land is conveyed bounded along a natural lake or pond the grant extends only to the water's edge.

3. *Same—What is Stream.*—A body of water five or six miles long and in some places a mile wide, fed by springs, without a current in its natural state and having no connection with any stream of water except by a slough through which during a portion of the year a current of water passes into a river, which flow is stopped in the summer, is not a stream as distinguished from a pond or lake. And a township having platted a school section and sold lots on both sides of such a body of water, the grants do not extend beyond the water's edge.

4. *Same — Deed —Description.*—A defense in ejectment based on the right of the defendants as riparian owners on a stream to take to the thread of the stream cannot be invoked where neither the deed conveying certain lots nor the plat in accordance with which they were conveyed nor any other part of the record shows the lots to border on the stream.

5. *Title—Adverse Possession — Evidence.*—A claim by defendants in ejectment "of a portion of water known as 'Meredosia Lake,' claiming title to it by possession for more than twenty years as fishermen," supported merely by the declarations of witnesses that defendants had had exclusive possession for that length of time, but without evidence as to how or to what extent the possession was had or manifested, is without force or merit.

Ejectment by trustees of schools of township 16, range 13, to recover that part of section 16, township 16, range 13 W., of third principal meridian, in Morgan county, Illinois, lying east of lots 1, 2 and 3, and west of lots 4 to 13, in said section. The lands in controversy are, in fact, part of the bed of a sheet of water known as "Meredosia lake." Judgment for defendants. Plaintiffs appeal.

SHOPE, J., delivered the opinion of the court:

Fractional section 16 was, by the United States, "granted to the State for the use of the inhabitants of such township for the use of schools." Enabling Act of Congress, April 18, 1818 (3 U. S. St. at Large, 428); Organic Laws Ill. 1 Gross' St. (19.) And this enabling act was formally accepted by an ordinance of the constitutional convention of August 26, 1818. Laws Ill. 1819, Appendix, 21; Organic Laws Ill. 1 Gross' St. (20.) The enabling act and ordinance constituted, as this court held in Bradley v. Case, 3 Scam. 585, a solemn compact between the United States and this State, whereby the State of Illinois became the purchaser of the school section for a valuable consideration, with full power to sell or lease the same for the use of schools, as the State might provide, and think most beneficial to the inhabitants of the respective townships.

Sections 16, in the several townships in the State, having been granted and accepted as above

stated, were not public lands within the act of congress of March 30, 1822 (3 U. S. St. at Large, 659), authorizing the State "to survey and mark, through the public lands of the United States, the route of the canal connecting the Illinois river with the southern bend of Lake Michigan" (Canal Trustees v. Haven, 5 Gilman, 548); and for the like reason we must hold that they were not "swamp and overflowed lands, made unfit thereby for cultivation," remaining "unsold at the passage of" the act of congress of September 28, 1850 (9 U. S. St. at Large, 519); being an act "to enable the State of Arkansas and other States to reclaim the swamp lands within their limits." After the grant of 1818, they ceased to be public lands of the United States, nor could they after that time be regarded as unsold lands, and so they were unaffected by the swamp-land act.

When, therefore, the defendants in this case offered in evidence the deed of the county clerk of Morgan county, purporting to have been made by order of the county board of that county, on the authority of the laws of this State relating to swamp and overflowed lands, and to convey parts of this school section, the offer should have been denied, and it was error in the circuit court not to have sustained the plaintiff's objection. And this is so, independent of all questions as to whether the uncertain and defective description of the premises said to be part of this particular section rendered the deed inoperative to that extent, or whether the premises attempted to be conveyed formed any part of the lands sued for or bounded thereon. When, therefore, the official character of appellants was admitted, and the enabling act and ordinance of acceptance had been offered in evidence, appellants' right of recovery was complete, unless it could be shown that the State had parted with the title to the lands described in the declaration, or that the township authorities had parted with or lost their right of possession in the same.

It is contended by appellees that Meridosia lake is a stream of water some five miles in length, and emptying into the Illinois river; and that appellants, by the proper officers, having platted and sold the land to the margin of and bordering on the stream, the grantees took to the middle of the stream; that the title of such grantees is an outstanding title; and appellees, being shown to be in possession under such grantees, rightfully prevailed in the circuit court, and ought to prevail here. The books and authorities are all agreed that streams and bodies of water within the ebb and flow of the tide are, at common law, navigable; and the riparian proprietor's title does not, speaking generally, extend beyond the shore. And it is equally well settled that grants of land, bounded on streams or rivers above tide-water, carry the exclusive right and title of the grantee to the center of the stream, *usque ad filum aquæ*, subject to the easement of navigation in streams navigable in fact, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the stream. 3 Kent, Com. 427; 2 Hil. Real Prop. 92; Ang. Water-courses, § 5; Jones v. Soulard, 24 How. 41; Indiana v. Milk, 11 Fed. Rep. 389; Canal Appraisers v. People, 17 Wend. 596; Child v. Starr, 4 Hill, 369; Seaman v. Smith, 24 Ill. 521; Rockwell v. Baldwin, 53 Ill. 19; Braxon v. Bressler, 64 Ill. 488; Washington Ice Co. v. Shortall, 101 Ill. 46.

But an entirely different rule applies when land is conveyed bounded along or upon a natural lake or pond. In such case the grant extends only to the water's edge. Ang. Water-courses, §§ 41, 42; 3 Kent, Com. 429, note *a;* citing Bradley v. Rice, 13 Me. 201, and Waterman v. Johnson, 13 Pick. 261. See Warren v. Chambers, 25 Ark. 120; Indiana v. Milk (U. S. Circuit Court Dist. Ind., Gresham, J.), 11 Fed. Rep. 389; citing Wheeler v. Spinola, 54 N. Y. 377; Mansur v. Blake, 62 Me. 38; State v. Gilmanton, 9 N. H. 461; Paine v. Woods, 108 Mass. 160; Fletcher v. Phelps, 28 Vt. 257; Austin v. Rutland R. Co., 45 Vt. 215; Boorman v. Sunnuchs, 42 Wis. 233; Delaplaine v. Chicago & N. W. R. Co., *Id.* 214; Seaman v. Smith, 24 Ill. 521. See, also, Nelson v. Butterfield, 21 Me. 229; West Roxbury v. Stoddard, 7 Allen, 158; Canal Com'rs v. People, 5 Wend. 423, 446; Jakeway v. Barrett, 38 Vt. 316; Primm v. Walker, 38 Mo. 99; Wood v. Kelley, 30 Me. 47.

The line of defense adopted by appellees, as before stated, presupposes the existence of certain facts, viz.: (1) That appellants, being owners of section 16, granted the lands abutting upon the water spoken of as Meridosia lake, within such section bounding such grants along or upon the margin of such water; (2) that Meridosia lake is not, at the common law, navigable; (3) that Meridosia lake, and within the bounds of section 16, is a stream or river, as contradistinguished from a lake; and (4) that the terms of the grant do not clearly denote an intention to stop at the edge or margin of the stream.

If the record in this case shows the existence and concurrence of all these facts, this judgment, upon the authority of the cases cited, may be affirmed; but, if it shall appear that the case made by the record does not show the existence of the supposed facts, reversal must follow. It is not pretended that Meridosia lake is a stream or body of water navigable at common law—that is to say, it is not within the ebb and flow of the tide; and hence the rules of law applicable in such case cannot be invoked. The contention is that Meridosia lake is a stream of water about five miles long, emptying into the Illinois river, with its southern extremity and outlet within the bounds of section 16. A careful examination of the records shows that this lake is a natural body of water, five or six miles long, and in some places a mile in width; that is fed by springs; that its southern extremity extends into section 16; that it has no connection with any stream of water, except by a slough at the south end, and near the south line of section 16; that the body of

the lake, in its natural state, is without current; but that during a portion of the year a current of water passes from the lake, through the slough referred to, into the Illinois river, which flow, however, is stopped in the summer. The record does not show the average width of the lake, the average depth of the water in the lake in its natural state, nor whether or not it is in fact navigable; nor are we able to learn therefrom the length and width of the slough, nor the depth of the water flowing through the same, or the rapidity of the flow from the lake into the river at the natural stage of water in the lake. All we can know of this outlet we must gather from the plat made by the township trustees in 1846, taken in connection with the fact testified to by witnesses, that, for a portion of the year, some water from a land-locked natural body of currentless water, five or six miles long, and in places a mile in width, flows there-through; and from this alone we are asked to find and hold that such a body of water, so situated, is a stream, and not a lake. This, as we understand the law, we cannot do.

The word "stream" has a well-defined meaning, wholly inconsistent with a body of water at rest: "It implies motion; as, to issue in a stream; to flow in a current."—Webst. Dict. Indeed, the controlling distinction between a stream and a pond or lake is that in the one case the water has a natural motion—a current—while in the other the water is, in its natural state, substantially at rest. And this is so, independent of the size of the one or the other. The flowing rivulet of but a few inches in width is a stream as certainly as the Mississippi. And when lands are granted by the proprietor of both land and stream, bounding such grant upon the stream, the grantee acquires right and title to the thread or middle of the stream. This right is grounded upon the presumption that the grantor, by making the stream the boundary, intended his grantee to take to the middle of the stream; and this presumption will prevail until a contrary intent is made to appear. Rockwell v. Baldwin, 53 Ill. 19. The right spoken of does not rest upon the principle that, when a grant is bounded on a stream, the bed of the stream to the thread or middle passes as incident or appurtenant to the bordering land; for the bed of the stream is land, though covered with water, and land cannot pass as appurtenant to land.

As is said in Child v. Starr, 4 Hill, 369: "A conveyance of one acre of land can never be made, by any legal construction, to carry another acre by way of incident or appurtenance to the first." The riparian proprietor, claiming to the thread or middle of the stream, must show the bordering water to be a stream, and that his grant, in terms or legal effect, is bounded upon or along such stream; that the stream is made the boundary; and, while it is obvious that a currentless body of water cannot be a stream, the fact of some current in a body of water is not of itself, in every instance, sufficient to determine its character as a stream, as distinguished from a pond or lake. The presence of some current is not enough alone to work an essential change in so essentially different thing as a stream and a lake; for a current from a higher to a lower level does not necessarily make that a stream or river which would otherwise be a lake, and the swelling out of a stream into broad water-sheets does not necessarily make that a lake which would otherwise be a river. Ang. Water-courses, § 4. We are, therefore, constrained to hold that the position, size, and character of this body of water, as shown by this record, fixes its character as a lake, and not a stream, notwithstanding some part of its water during a portion of the year may flow through the slough into the Illinois river.

Another fact, the existence of which is presupposed, is that the proper officers, acting under the laws of the State, granted the land bordering on so much of the stream called "Meridosia lake" as was within section 16, bounding such grants on the stream. The only grants shown in this record to have been made, and upon which this contention could be based, are the patents issued to Edward Watson and Edward Lusk. Watson took under his patent that part of section 16 designated on the plat of the section made by the trustees as lots 12 and 13, containing 22 4-100 acres by survey, and Lusk took under his patent lots 3 to 11, inclusive, by the same plat, containing by the plat 88 3-4 acres. By reference, the plat of the section made by the trustees in 1846, became a part of the conveyance, as much so as if it had been copied into the patent-deed. Piper v. Connelly, 108 Ill. 646; Louisville & N. R. Co. v. Koelle, 104 Ill. 455. And the rule of law is that, when lands are purchased and conveyed in accordance with a plat, the purchaser will be restricted to the boundaries as shown by the plat. McCormick v. Huse, 78 Ill. 363; citing McClintock v. Rogers, 11 Ill. 279. The patent-deeds contain no intimation that the lots conveyed border on a lake or stream; and when we look at the plat, as we must, all we can determine is the shape and area of the several lots. No *data* is given from which we can determine the width or depth of any lot, nor can we know from the plat that either the east line of lot 3, or the west line of lots 4 to 13, inclusive, as shown on the plat, are in fact the western and eastern boundary of Meridosia lake. It may be so in fact, but this record fails to show it to be so; while, as to lots 1 and 2, the record does not show that they were at any time sold or conveyed, or the title vested in the State in any way divested. We therefore hold that it does not appear from the record that the State, for the inhabitants of the township, granted all the lands bordering on Meredosia lake, and within this fractional section 16, nor that the grants, to the extent they were made, were bounded on the lake. It is thus seen that the essential facts, the existence of which is presupposed as a basis for the defense interposed, are not shown to exist; and hence the defense based

on the right, as riparian owners on streams, to take *ad filum aquæ*, cannot be invoked, and has no application to this case. For the reasons stated, all the evidence offered by the appellees on the trial, relating to the title, ownership, and possession of the lots shown by the trustees' plat, should have been refused as immaterial, and its reception, over the objection of appellants, was error.

One other question remains to be considered, viz., appellees' claim that they are in possession "of a portion of water known as 'Meridosia lake,' claiming title to it by possession for more than twenty years, as fishermen." Appellants sue for a body of land. Some part of the premises described in the declaration must form the bed of that part of Meridosia lake within section 16, but what part is lake bed and what shore we cannot determine from this record. Appellees' claim of title by possession is not of land, but of water. But if this should be thought hypercritical, and it be assumed that appellees' claim is of twenty years' adverse possession of the bed of the lake within the section, still it must be observed that such possession of land as here claimed is a conclusion of law arising from existing facts. The evidence preserved in the record goes no further than the declaration of witnesses that appellees, and those under whom they claim, had, and had had, exclusive possession for that length of time. But how, and to what extent—whether the lake, or any part of it, was inclosed by fences, dams, walls, or weirs—and how this adverse dominion was manifested, there is not one word to show. The claim, under this proof, is without force or merit.

The judgment of the circuit court is reversed, and the cause remanded.

NOTE.—1. *Riparian Rights on Tidal-waters.*—In general terms it may be said, that all waters were navigable at common law which were within the ebb and flow of the tide. The term "navigable" did not include non-tidal-waters, though they might be navigable in fact.[1]

Grants of land to an individual, whether from the government or a private person, bounded on tidal or navigable waters were presumed to extend to the high water line.[2] This line was defined by the usual high tide and not by extraordinary tides or the height of the water when driven by storms.[3] In a single New Jersey case,[4] a grant on tidal-waters was declared to extend to high water mark when the tide was high, and to low water mark when the tide was low; but this statement of the law is doubtless incorrect and does not appear to have received the sanction of any other decided case.

Where, by the cutting of an artificial channel, the tide ebbs and flows where it did not before, the title of the riparian proprietor to the center of a stream is not thereby disturbed.[5]

[1] Middleton v. Pritchard, 3 Scam. (Ill.) 510; Braxon v. Bressler, 64 Ill. 488; Chicago v. McGinn, 51 Ill. 266.

[2] Middleton v. Pritchard, 3 Scam. (Ill.) 510; 3 Kent's Com. 427.

[3] Seaman v. Seaman, 24 Ill. 521.

[4] Arnold v. Mundy, 1 Halst. (N. J.) 1.

[5] Wheeler v. Spinola, 54 N. Y. 377.

The strip of land between high and low water mark on navigable water and the beds of tidal streams belong generally to the government for the use of the public.[6] The government, however, unless restrained, may grant this strip by express terms to those who may own the upland or which it borders.[7] By force of the colonial ordinance of 1641 or 1647, the owner of the upland in Maine and Massachusetts owns to the low tide mark, provided that it is not more than 100 rods from his upland.[8]

2. *Riparian Rights on Ponds and Lakes.*—A grant of land bounded on a natural lake or pond is presumed to extend to low water mark;[9] and on the great lakes to "the line where the water usually stands when unaffected by any disturbing cause."[10] A pond may be so small, however, and of such a character that a grant will be presumed to include it.[11] Thus a grant from the State bordering on a pond five miles long and three-fourths of a mile wide, with no current and no main channel, and not generally navigable, was held to carry title to the center of the pond.[12]

Where a natural pond has been enlarged *permanently*, a grant of land bounded on it will be presumed to carry title to the low water mark as thus formed.[13] If the pond is entirely artificial, a conveyance bounded on it will be presumed to extend to the center of the stream which forms it.[14]

In De Laplaine v. C. & N. W. R. Co.,[15] the court said: "But while the riparian proprietor only takes to the water line, it by no means follows, nor are we willing to admit, that he can be deprived of his riparian rights without compensation. As proprietor of the adjoining land and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place; he has the right to build piers and wharves in front of his land out to navigable waters in aid of navigation, not interfering with the public use. These are private rights incident to the owership of the shore which he possesses distinct from the rest of the public. All the facilities which the location of the land with reference to the

[6] Seaman v. Seaman, 24 Ill. 521; 3 Kent's Com. 427. But the public might not use it for a general public landing: Post v. Pearsall, 22 Wend. 425; Post v. Hewlett, 20 Wend. 111.

[7] Hagan v. Cleveland, 8 Port. (Ala.) 9; Lorman v. Benson, 8 Mich. 18; Rogers v. Jones, 1 Wend. 237.

[8] Lapish v. Bangor Bank, 8 Greenl. 85; Pike v. Munroe, 36 Me. 309; Boston v. Richardson, 105 Mass. 351; Boston v. Richardson, 13 Allen, 146; Waterman v. Johnson, 13 Pick. 261; Ingraham v. Wilkinson, 4 Pick. 268; Commonwealth v. Alger, 7 Cush. 53.

[9] Robinson v. White, 42 Me. 209; Waterman v. Johnson, 13 Pick. 261; West Roxbury v. Stoddard, 7 Allen, 158; Wheeler v. Spinola, 54 N. Y. 377; Canal Co. v. People. 5 Wend. 423; State v. Gilmanton, 9 N. H. 461; Austin v. Rutland R. Co., 45 Vt. 215; Fletcher v. Phelps, 28 Vt. 257; Jakeway v. Barrett, 33 Vt. 316; Booman v. Sunnuchs, 42 Wis. 233; State v. Milk, 11 Fed. Rep. 389. See also Nelson v. Butterfield, 21 Me. 220.

[10] Seaman v. Seaman, 24 Ill. 521; Delaplaine v. Chicago, etc. R. Co., 42 Wis. 214.

[11] State v. Milk, 11 Fed. Rep. 389.

[12] Ledyard v. Ten Eyck, 36 Barb. 102.

[13] Wood v. Kelley, 30 Me. 47; Bradley v. Rice, 13 Me. 198. But see Waterman v. Johnson, 13 Pick. 261. If the enlargement is not permanent the low water mark of the pond in its natural state governs: Paine v. Woods, 105 Mass. 160; Hathorne v. Stinson, 12 Me. 183.

[14] Mansur v. Blake, 62 Me. 38; Robinson v. White, 42 Me. 209; Lowell v. Robinson, 16 Me. 357; Wheeler v. Spinola, 54 N. Y. 377; Phinney v. Watts, 9 Gray, 269.

[15] 42 Wis. 214

lake affords, he has the right to enjoy for purposes of gain and pleasure; and they oftentimes give property thus situated its chief value." In this particular case a railroad company which had obstructed a riparian proprietor's access to his land from the lake by building its track in the waters fronting thereon was condemned to pay him damages. We believe that the doctrine of the case is just and should apply also to the rights of riparian owners on tidal-waters and streams navigable in fact where the bed of the stream belongs to the government.[16]

3. *Riparian Rights on Non-tidal Streams.*—At common law, a grant of land bounded on a stream above tidal-water was presumed to extend to the center-thread of the stream, *ad medium filum aquæ*.[17] This doctrine seems to have obtained universally in this country as applied to lands bordering on streams unnavigable in fact.[18] In Pennsylvania,[19] Alabama,[20] Tennessee[21] and Iowa,[22] and in North Carolina,[23] by statute, the doctrine of the common law has been declared inapplicable in part to the conditions of those States, and where a non-tidal stream is in fact navigable a grant of land bounded on it to a private person is presumed to extend to the waters' edge only. The same rule has been recognized in the federal courts relative to the large river northwest of the Ohio, but these decisions are based on positive law[24] and the rule announced is of doultful authority.[25] A navigable stream in the State mentioned is one either tidal or non-tidal, navigable "by such vessels as are employed in the ordinary purposes of commerce, whether foreign or inland, and whether steam or sail vessels." A stream navigable by small boats and rafts only is not navigable in a legal sense.[26]

The weight of American authority is clearly in favor of the common law rule and a grant of land bounded on a stream above tide-water, whether in fact navigable or not, is presumed to extend *ad filum aquæ*.[2] The riparian owner has the exclusive right to fish, to take away sand and rock, to have access to the stream over his own lands, to build docks and generally to make any use of the bed of the river not inconsistent with the free and unobstructed public use of the river for purposes of navigation when in fact navigable.[28] The public has an easement for the navigation of the stream,[29] and the right to improve the river channe and remove obstructions to navigation.[30] The navigator may moor his craft to trees on the shore,[31] and perhaps land to expose his sails and merchandise as the exigencies of navigation may require;[32] but he has no right to obstruct permanently, the water front by mooring rafts or other obstructions,[33] or to use the banks for more than a temporary landing,[34] or to tow on the banks of a tidal river.[35]

The boundary of the riparian proprietor's ownership in a stream is found by running lines from the limits of his shore possessions at right angles to the general course of the stream, till they meet the center thread.[36] Islands in a river, the bed of which passes by grant of the adjoining bank belong to the owner thereof; but if they lie in the middle of the stream they belong in severalty to the owners on each bank according to a continuation of the *filum aquæ* from the point where it divides.[37]

While a grant of land upon a non-tidal stream is generally presumed to carry title to the thread of the stream, it is competent, of course, for grantor to limit his grant by express terms to the edge or bank of the stream.[38] The following terms have been held to so limit grants: "on the bank;"[39] "on the bank agreeable to traverse;"[40] "along the shore;"[41] "along the margin

16 Lyon v. Fishmonger's Co., L. R. 1 App. Cas. 662; Yates v. Milwaukee, 10 Wall. 497; Rice v. Ruddiman, 10 Mich. 125; Diedrich v. N. W. R. Co., 42 Wis. 248. But see Stevens v. P. & N. R. Co., 34 N. J. L. 532; Bailey v. P. W. & B. R. Co., 4 Har. (Del.) 389.

17 3 Kent's Com. 427, Canal Trustees v. Haven, 11 Ill. 554; Knight v. Wilder, 2 Cush. 199; Cold Springs Iron Works v. Tolland, 9 Cush. 492; Brown v. Chadbourne, 31 Me. 9; Brown v. Kennedy, 5 H. & J. (Md.) 157; Canal Co. v. People, 5 Wend. 423; Williams v. Buchanan, 1 Ired. (N. C.) 535; Claremont v. Carlton, 2 N. H. 369; Walker v. Bd. Pub. Works, 16 Ohio, 540; Martin v. Nance, 3 Head (Tenn.), 648; Horne Richards, 4 Call (Va.), 441; Hayes v. Bowman, 1 Rand. (Va.) 417; Mead v. Haynes, 3 Rand. 33; Fletcher v. Phelps, 28 Vt. 257; Arnold v. Elmore, 16 Wis. 536; Wright v. Howard, 1 Sim. & St. 190.

18 Washington Ice Co. v. Shortall, 101 Ill. 46; Cox v. State, 3 Blackf. (Ind.) 193; Lunt v. Holland, 14 Mass. 149; Hatch v. Dwight, 17 Mass. 289; Harlow v. Fisk, 12 Cush. 302; Bradford v. Cressey, 45 Me. 9; Arthur v. Case, 1 Paige, 447; People v. Platt, 17 Johns. 195; Ingraham v. Threadgill, 3 Dev. (N. C.) 59; Cates v. Waddington, 1 McCord (S. C.), 580; Stuart v. Clark, 2 Swan (Tenn.), 9; Coovert v. O'Conner, 8 Watts, 470; State v. Milk, 11 Fed. Rep. 389.

19 Carson v. Blazer, 2 Binn. 475; Shrunk v. Schuylkill Nav. Co., 14 Serg. & R. 71; Wood v. Appal, 63 Pa. St. 221; Rundle v. D. & R. Canal Co., 14 How. 79.

20 Bullock v. Wilson, 2 Port. (Ala.) 436.

21 Elder v. Burrus, 6 Humph. 358.

22 Haight v. Keokuk, 4 Iowa, 199.

23 Ingraham v. Threadgill, 3 Dev. 59; Wilson v. Forbes, 2 Dev. 80.

24 Railroad Co. Schurmeir, 7 Wall. 272; State v. Milk, 11 Fed. Rep. 389.

25 Gavit v. Chambers, 3 Ohio, 495.

26 Stuart v. Clark, 2 Swan (Tenn.), 19. But the public may have an easement for boating, rafting, logging, etc. See also Olson v. Merrill, 42 Wis. 203.

27 Houck v. Yates, 82 Ill. 179; Braxon v. Bressler, 64 Ill. 488; Chicago v. Laflin, 49 Ill. 172; Adams v. Pease, 2 Conn. 481; Jones v. Water Lot Co., 18 Ga. 539; Bardwell v. Ames, 22 Pick. 333; Magnolia v. Marshall, 39 Miss. 109; Morgan v. Reading, 3 S. & M. (Miss.) 366; Varick v. Smith, 9 Paige, 547; Commissioners v. Kempshall, 26 Wend. 404; People v. Canal Appraisers, 13 Wend. 355; Palmer v. Mulligan, 3 Cai. 308; Arnold v. Mundy, 1 Halst. (N. J.) 1; Gavit v. Chambers, 3 Ohio, 495; McCullough v. Wall, Rich. L. (S. C.) 85; Watson v. Peters, 26 Mich. 508; Atty.-Gen. v. Evart Booming Co., 34 Mich. 463.

28 Chicago v. Laflin, 49 Ill. 172; Hooker v. Cummings, 20 Johns. 91; Canal Co. v. People, 5 Wend. 423; Walker v. Shepardson, 4 Wis. 486.

29 Chicago v. McGinn, 51 Ill. 266; Adams v. Pease, 2 Conn. 481; Magnolia v. Marshall, 39 Miss. 109; Lamb v. Rickets, 11 Ohio, 311; Ryan v. Brown, 18 Mich. 196.

30 Commissioners v. Withers, 29 Miss. 21; Delaplaine v. C. & N. W. R. Co., 42 Wis. 214.

31 Middleton v. Pritchard, 3 Scam. (Ill.) 510.

32 O'Fallon v. Haggett, 4 Mo. 209.

33 Loman v. Benson, 8 Mich. 18; Harrington v. Edwards, 17 Wis. 586.

34 O'Fallon v. Haggett, 4 Mo. 209.

35 Ball v. Herbert, 3 Term Rep. 253.

36 Clark v. Campbell, 19 Mich. 325; Bay Gas Light Co. v. Industrial Works, 28 Mich. 182.

37 3 Kent's Com. 427; Jones v. Soulard, 24 How. 41; Middleton v. Pritchard, 3 Scam (Ill.) 510; Ingraham v. Wilkinson, 4 Pick. 268; Granger v. Avery, 64 Me. 292; Claremont v. Carlton, 2 N. H. 369; Booman v. Sunnuchs, 42 Wis. 233.

38 Watson v. Peters, 26 Mich. 508.

39 Dunlap v. Stetson, 4 Mason, 349; Bradford v. Cressey, 45 Me. 9.

40 Starr v. Child, 5 Denio, 599.

41 Child v. Starr, 4 Hill, 369.

42 Nickerson v. Crawford, 16 Me. 245.

of the cove;"[42] "to the west side of cedar creek, thence down the west line of said creek."[43]

The following term have been held to carry title to the center of the stream: "on,"[44] "by,"[45] "along,"[46] "down,"[47] "on the margin of"[48] and "situated east and north of"[49] a stream. Where the meander lines bounding the water front differ from the true lines the latter govern.[50] In computing the amount of land conveyed no account is taken of that between low water mark and the thread of streams in fact navigable.[51] "On" a swamp carrier title to the center of a stream in the middle thereof.[52] CHAS. A. ROBBINS.

[42] Rockwell v. Baldwin, 53 Ill. 19.
[44] Thomas v. Hatch, 3 Sumner, 170; Pike v. Munroe, 36 Me. 309; Magnolia v. Marshall, 39 Miss. 109; Warner v. Southworth, 6 Conn. 470; Granger v. Avery, 64 Me. 292.
[45] Jones v. Soulard, 24 How. 41; Thomas v. Hatch, 3 Sumner, 170; Lowell v. Robinson, 16 Me. 357; Magnolia v. Marshall, 39 Miss. 109; *Ex parte* Ipswich, 13 Pick. 431; Phinnay v. Watts, 9 Gray, 269.
[46] Robinson v. White, 42 Me. 209; Luce v. Carley, 24 Wend. 451; Starr v. Child, 20 Wend. 149.
[47] Pike v. Munroe, 36 Me. 309.
[48] *Ex parte* Jennings, 6 Cow. 518.
[49] Morrison v. Keen, 3 Greenl. 474.
[50] Railroad v. Schurmeier, 7 Wall. 272.
[51] Lamb v Rickets, 11 Ohio, 311.
[52] Felder v. Bonnett, 2 McMul. (S. C.) 44.
[53] In support of the principal case as to what constitutes a stream, see State v. Gilmanton, 14 N. H. 467. See also Bassett v. Salisbury Mfg. Co., 43 N. H. 569.

WILL—CODICIL—RELEASE —CONSTRUCTION—REPUBLICATION.

SLOANE V. STEVENS.

Court of Appeals of New York, October 11, 1887.

Where a testator by his will declares that he releases all the demands which his estate may have against any of the persons named in his will, and in that will names a number of persons, the will operates to release all demands against the persons so named. In a codicil to his will, another person against whom he had a demand is named, but no release of that demand is indicated, that person is not released, although the codicil republishes the will, and becomes in other respects a part of it.

FINCH, J., delivered the opinion of the court:

One would hardly have expected that the will of so eminent and able a lawyer as the late Charles O'Conor would come before us for construction, and present a question quite debatable, and involving some difficulty. He made his will, about which as it stood at the date of its execution there was no ambiguity, and which had the clearness and precision we were certain to anticipate. But fifteen months later, and about two weeks before his death, he made and executed a codicil which creates a serious difficulty, and, if drawn by him or at his verbal dictation, may have some explanation in his failing health. By the terms of the will he released in its sixth clause certain of his debtors, conveying his purpose in the following language: "I hereby release all claims or demands which I may have at my death against any person or persons named in this will." In the codicil which he executed, his attention was again drawn to his debtors, and his duty or pleasure as it respected their indebtedness to him, for its fourth clause provided: "To Francis C. Barlow, Samuel Ward, and Edmund Elmendorf, Jr., respectively, I give any sums of money in which any of them may chance to stand indebted to me at the time of my death. Notes, if found, etc., to be canceled and delivered up." Immediately following this is the provision out of which this controversy has arisen, and which reads thus: "All books, papers, duplicates, etc., having any relation to the Tennessee bondholder's claim, I give to my faithful and honorable friend, C. Amory Stevens, to use in his discretion." The representative of O'Conor have sued Stevens to recover $50,000 for the legal services of their testator in the case referred to. The complaint sets out the will and codicil in full, and a schedule of the services claimed, which antedated both the will and the codicil, except the last item, which is earlier than the codicil by about a month. The defendant has demurred, insisting that by the terms of the will he is released and discharged from all liability. We cannot, therefore, stray outside of or beyond the allegations of the pleading. If there be extrinsic facts bearing upon the construction of the will and codicil, they are not now before us, and we must treat the case as if there were none material or admissible, and be guided only by the words of the testator.

The dispute turns upon the meaning of the phrase, "in this will," and seeks to evolve the sense in which it was used. The appellant argues that the will included the codicil, and the two instruments together constituted one testamentary act; that the execution of the codicil was a republication of the will as of that date, and the two instruments are to be read together as if their provisions had all been embodied in one instrument then for the first time executed; and that the testator thoroughly knew the rule, and appreciated its force, and must be assumed to have intended, when he released those "named in this will," to have intended to release also those named in any coidcil which might thereafter be executed, and become part and parcel of the testamentary act. There is abundance of authority establishing the general rule (Sherer v. Bishop, 4 Brown Ch. 55; Doe v. Walker, 12 Mess. & W. 591; Washburn v. Sewall, 4 Metc. 63; Van Cortlandt v. Kip, 1 Hill, 590; Caulfield v. Sullivan, 85 N. Y. 153); and, if it stood without limitation, it would go far to justify the contention of the appellant. But while the word "will" may and often does cover codicils afterwards made, and embrace the entire testamentary act, it nevertheless as frequently and more naturally is descriptive of the particular instrument as distinguished from that other and different instrument denominated a "codicil." Where both instruments exist, however, in the end and for many purposes they ma

constitute one testamentary act. They are, nevertheless, properly described, the one as a will and the other as a codicil, and those are appropriate words to discriminate and distinguish between them. In such case a testator may mean by the phrase "this will" the instrument as first prepared, and not as subsequently modified by a codicil; and since, in all cases of construction, the intention of the testator is to govern, it becomes to determine in which sense he used the word. It has therefore been decided that the word "will" does not cover or embrace the codicil where anything appears to show that it was not intended to do so. Fuller v. Hooper, 2 Ves. Sr. 243; Cole v. Scott, 19 Law J. (N. S.) 63; Pierpont v. Patrick, 53 N. Y. 595; Wetmore v. Parker, 52 N. Y. 450, 463. These cases show the distinction between the will as a final testamentary act, and the will as an instrument distinguished from another instrument called a codicil; and show that the former instrument will speak from its own date, and not from the death of the testator, where such an intent is manifest.

The testator seems to have had in mind this distinction, and discriminated between the two instruments. At the close of the will he formally revokes all previous "wills and codicils." He treats the two or more instruments, not as together constituting wills and revocable by that name, but as separate and distinct instruments, and revokes, not one, but each, and by their appropriate and usual designation. The release which he gave came at the close of the will, and after he had named all to whom it was to apply. There can be no doubt that, when he executed the will in which Stevens was not named, he did not then mean to release the latter. If he subsequently formed a different intention, we should expect to see it manifested. The failure to do so becomes more significant when we observe that he describes the codicil by that appropriate name, saying: "This is Charles O'Conor's first codicil to his last will and testament. This instrument made and signed April 28, 1884." Words of release are absent as to Stevens, although present as to others. Ward was not named in the will, and so was released in the codicil. Stevens was not named in his will, nor released in the codicil. Barlow and Elmendorf were named in the will, and so discharged, but were again named in the codicil, and again formally released. The appellant seeks to give a reason for this beyond forgetfulness on the one hand, or abundant caution on the other. He says the reason for the clause was to require the delivery up and cancellation of notes, etc., held against Barlow and Elmendorf. But that provision is merely incidental, and does not account for the words of release, which, as to these two persons, were needless. To make the surrender of evidences of debt the motive of the clause, is to elevate the incident to the chair of the principal, or seize upon a casual and perhaps needless remark as the key of an argument or the doctrine of a judgment. Precisely why the two legatees already released by the will were released by the codicil, it is not easy to determine; but the materiality of the clause lies mainly in the fact that the attention of the testator was drawn to the case of his debtors, and so strongly drawn as to induce a reputation; and nevertheless, in the next clause Stevens is named, but without words of release.

An examination of that clause indicates a very distinct and definite purpose. In the progress of the Tennessee case the testator had doubtless accumulated important and material papers, his own briefs and *memoranda* being of great utility and value to his client. Mr. O'Conor had a lien upon all these papers for his compensation, and doubtless realized that after his death his representatives might withhold them from a successor until the debt was paid or secured. But this step might be very troublesome and injurious to Stevens. The appeal to the federal court of last resort was approaching argument, and the prompt possesion of the papers might be very important to the litigant deprived of his counsel by death. The testator had great confidence in Stevens, and so he gave the papers to him, thereby waiving his lien, and calling his client "my faithful and honorable friend." His meaning seems to have been that he could trust Stevens to make a fair and honorable settlement, without the coercion of a lien and the withholding of books and paper, and so the testator directed that course to be pursued. Of course this was a needless precaution if the debt was released, for the lien would fall with it, and the naked surrender of the lien carried an implication of a purpose to retain the debt.

Recurring now to the will, certain of its terms become important. The release of persons named in "this will," as might have been the expression if the testator looked forward to codicils, naming others, but in this will; that is, in the will which I now, on this day, make. At that date a large part of the debt of Stevens had accrued. The testator knew him as one of his debtors, and plainly then intended not to release or discharge him. The persons to be discharged were identified by the phrase, "named in this will;" not in some other will or codicil to be possibly thereafter made, but named in that will, and so then and there identified. That was the clear and certain construction of the words, "in this will," when it was executed, and that meaning and legal effect cannot be changed by the codicil unless the codicil shows an intent to make the change. This codicil does not. Its intent points in the contrary direction. Its purpose was other and different. Our conclusion, therefore, is in harmony with that of the courts below.

The judgment should be affirmed, with costs, but with leave to the defendant, upon payment of costs, to withdraw his demurrer, and serve an answer within twenty days from the entry of judgment.

NEGOTIABLE PAPER — INDORSEMENT — CONFLICT OF LAWS—WAIVER.

DUNNIGAN V. STEVENS.

Supreme Court of Illinois, September 27, 1887.

1. *Negotiable Paper—Indorsement—Waiver—Administration.*—Where, in a promissory note, is a stipulation that all makers, drawers and indorsers waive presentment and demand of payment, one who indorses such note becomes thereby absolutely bound for its payment. And if, before the maturity of the note, he dies, and his estate comes to be administered, his liability as indorser of that note is not treated as a contingent, but as a fixed liability.

2. *Conflict of Laws—Lex Loci Contractus—Promissory Note.*—The liability of an indorser upon a note is governed by the laws of the State in which such note is indorsed.

SHELDON, J., delivered the opinion of the court:

On January 1, 1881, Clemuel R. Stevens, deceased, sold a farm in Sullivan county, Indiana, to one Samuel H. Kisner, for an agreed consideration of $8,000. The sum of $500 was paid in cash, and for the remainder of the purchase money Kisner executed his notes to Stevens payable in bank in one, two, three, four, five, six, seven, eight, nine and ten years after date, with interest payable annually at the rate of eight per cent., and secured the payment of the same by mortgage on the premises purchased. Afterwards, Stevens purchased of Richard Dunnigan some land situate in Clark county, Illinois, and in payment therefor transferred to Dunnigan, by indorsement in blank, six of the Kisner notes—the ones falling due January 1, 1886, and after. Stevens died, and after his death his administrators sold the remaining notes—the ones falling due January 1, 1882, 1883, 1884 and 1885—to one John J. Brake. The notes maturing up to January 1, 1884, remaining unpaid, Brake commenced proceedings to foreclose the mortgage aforesaid in the circuit court of Sullivan county, Indiana; making Kisner and Dunnigan the only parties defendant. Dunnigan filed an answer, also a cross-complaint, claiming an interest in the mortgaged property. A judgment of foreclosure was rendered, finding that the mortgaged property was not susceptible of sale in parcels, and directing that it be sold as a whole, and the proceeds applied—First, to indebtedness due; second, to that not due, with a rebate, etc. A sale under this judgment resulted in only enough to satisfy the Brake notes, and pay the sum of $500 on the notes held by Dunnigan. A personal judgment in the foreclosure suit was rendered against Kisner, and an execution issued thereon was returned, "No property found."

Dunnigan filed his claim against Stevens, as indorser of the notes so indorsed by him to Dunnigan, for allowance against the estate of Stevens in the county court of Clark county, where the claim was disallowed. On appeal to the circuit court, there was judgment given against the administrators for $560, the amount of interest due on the notes, and that Dunnigan pay the costs in the proceedings; the claim having been filed subsequent to the time appointed by the administrators for the presentation of claims against the estate. The judgment of the circuit court was affirmed by the appellate court for the third district, and this writ of error is brought to reverse the judgment of the appellate court. The following is a copy of one of the notes in question, and the indorsement:

"$500. TERRE HAUTE, IND., January 1, 1881.

"Five years after date I promise to pay to the order of Clemuel R. Stevens, at P. Shannon's bank, Terre Haute, Ind., five hundred dollars, value received, without any relief from valuation and appraisement laws, with interest at eight per cent. per annum from date until paid, and attorney's fees. The drawers and indorsers severally waive presentment for payment, protest, and notice of protest, and non-payment of this note. Interest payable annually.

"No. 5. SAMUEL H. KISNER."

Indorsed: "C. R. STEVENS."

The notes are all alike except in amount and time of payment; the others being for $700 each. The notes and the indorsements were both made in the State of Indiana.

The statute of Indiana, at the time, provided as follows: "Notes payable to order or bearer in a bank in this State shall be negotiable as inland bills of exchange, and the payees and indorsees thereof may recover as in case of such bills." It is held by the Supreme Court of Indiana that the provisions of the law-merchant in regard to the presentment for payment and notice of protest and of non-payment may be waived by the terms of the contract, and such waiver extends to the indorsers.

Our statute concerning the settlement of the estates of deceased persons provides: "Any creditor whose debt or claim against the estate is not due may, nevertheless, present the same for allowance and settlement, and shall thereupon be considered as a creditor under this act, and shall receive a dividend of said decedent's estate after deducting a rebate of interest for what he shall receive on such debt, to be computed from the time of the allowance thereof to the time such debt would have become due according to the tenor and effect of the contract." § 67, ch. 3, Rev. Stat. And § 70 declares that all debts and demands not exhibited to the court within two years from the granting of letters of administration shall be forever barred, except as to subsequent discovered assets.

Considerable stress has been laid in argument on the fact of the insolvency of the maker, Kisner, of there having been personal judgment against him, and his estate exhausted. Under our statute this would be important as showing diligence to collect of the maker, but, the notes and indorsements having been made in the State

of Indiana, it is the law of that State which is to govern in respect to the liability of the indorser. The notes being payable in the bank in that State, the indorser's liability by the statute there is that which arises under the law-merchant. Under that law the indorsement of a note amounts to a contract on the part of the indorser that if, when duly presented, the note is not paid by the maker, he (the indorser) will, upon due and reasonable notice given him of the dishonor, pay the same to the indorser or other holder. Story, Prom. Notes, § 135. But here there is an express waiver in writing by the indorser of presentment of the notes for payment and of notice of their non-payment. This dispenses with the conditions precedent to the indorser's liability, and makes his obligations for the payment of the notes to be unconditional and absolute. On the maturity of the notes, the holder might immediately bring suit against the indorser without performance of any act.

An indorser may, by the form of his indorsement, make himself absolutely and positively, in all events, liable for the payment of the notes, with or without due presentment or due notice. Story, Prom. Notes, § 461. Where there is an agreement in writing to dispense with any demand upon the maker, or with notice of dishonor, the language will be construed to import an absolute dispensation with the ordinary conditions of an indorsement. *Id.* § 148. We consider that the indorser here, by the form of his indorsement, made himself absolutely and postively, in all events, liable for the payment of the notes; that his liability was as full as that of a surety or a guarantor. And the obligation of a surety or the guarantor of a promissory note is absolute to pay the note. Hunt v. Adams, 5 Mass. 359; Luqueer v. Prosser, 1 Hill, 256. And see Story, Prom. Notes, §§ 58, 59, and note.

It is said the indorser's contract here was to pay the notes if, when they became due, the maker did not pay them, and that when the notes were filed the condition had not been met. We do not consider that there is any such distinct condition as thus named—that there is any other condition than what is comprised in presentment for payment, and notice of non-payment. The condition in this respect, as above stated by Story, is "that if, when duly presented, it [the note] is not paid by the maker," etc. Dispensing with presentment carries with it all conditions as to paying, or the maker's failure to pay on presentment. And even if the contract were, as thus supposed, to pay the notes if, when they became due, the maker did not pay them, we hardly see how, in respect of liability to the indorsee, that would vary essentially from an absolute promise to pay the notes, or that the notes should be paid. Either form of promise would oblige the payment to be made at maturity, and would create the equal liability of the indorser for their payment at maturity.

It is again said the maker might pay the note at maturity, and so the indorser not have them to pay. But this would not be inconsistent with the indorser's liability for the payment of the notes. The same might be said in respect of a surety or a guarantor, that the principal debtor might pay the debt on its coming due; yet that would not militate against the previous obligation of the surety or guarantor to pay the debt. So, in the case of several makers of a promissory note, upon the death of one of them, the claim of the whole note, we take it, might be fixed and allowed against his estate, notwithstanding that, on the note becoming due, it might be paid by the surviving promisors, or each of them might pay his proportion of it, so that the decedent's estate would none, or but a proportional part, of the debt to pay.

We think the indorser here undertook that these notes should be paid at maturity; that there was a binding obligation on his part for their payment; that there was no condition or contingency as to the obligation itself, but that it was absolute and positive, and constituted a claim against the estate of the indorser; that it was properly filed as such against the estate; and that the rejection of it by the court, except as to the amount actually due, was erroneous. The statute required it to be exhibited to the county court within two years from the granting of letters of administration, or else be forever barred, except as to subsequently discovered assets. The statute is that "any creditor whose debt or claim against the estate is not due may present the same for allowance and settlement." "A creditor is he who has a right to the fulfillment of an obligation or contract." Bouvier, Law Dict. Dunnigan certainly occupied this position, and he held a claim against the estate not due; bringing himself precisely within the statute.

The judgments of the appellate and circuit courts will be reversed, and the cause remanded to the circuit court of Edgar county.

VENDOR AND VENDEE—MORTGAGE—BONA FIDE PURCHASER—PLEDGE—TRUSTS.

CLARK V. HOLLAND.

Supreme Court of Iowa, June 16, 1887.

1. A recorded mortgage reciting that the mortgagor holds the title in fee-simple and that it is given as security for purchase money is notice that the mortgagor either had, or had a right to, a deed from the mortgagee. If no deed had passed the mortgage would still bind the equitable interest of the mortgagor, and, as against an assignee of the mortgage, a purchaser from the heirs of the mortgagee, with notice of the record, takes subject to the mortgage.

2. One who buys in at an execution sale notes pledged with him as collateral security, is not within the rule that a trustee cannot buy at his own sale.

ADAMS, C. J., delivered the opinion of the court:

The mortgage in question was executed by the defendant Holland to one N. B. Brown, to secure a promissory note executed by Holland to Brown, and made payable to order. The note was sold upon an execution against Brown, and purchased by the plaintiff. The land upon which the mortgage was executed did not stand in Holland's name, and it seems probable that he never had the legal title. The defendant Phelps claims that he did not, and, for the purposes of the opinion, it may be conceded that he did not. Phelps found the legal title belonging apparently to Susan Brown, N. E. Brown, and H. T. Brown, and from them he obtained a deed paying a valuable consideration therefor.

It seems to be conceded that the land belonged originally to N. B. Brown. He died, and the legal title, we infer, passed to his widow, Susan Brown, and his sons, N. E. and H. T. Brown, who are the defendant Phelps' grantors. At the time the mortgage was executed, N. B. Brown held the legal title, and we have a case where the mortgagor appears, so far as the record shows, to have attempted to mortgage land, which not only did not belong to him, but which belonged to the mortgagee. The real fact appears to be that Brown sold the land to Holland, but for some reason omitted to make a deed. Notwithstanding such omissions, however, he took a mortgage upon the land from Holland, which is the mortgage in question. Holland, then, at the time he executed the mortgage, was the equitable owner, and the mortgage had the effect to bind the interest, as against all persons who had actual knowledge of such interest, or knowledge of facts which were sufficient to put them upon inquiry.

The evidence shows that before Phelps purchased he discovered, in some way, the record of the mortgage, and heard it read at least in part. The fact of the record known to Phelps was sufficient to lead to the inference that a mortgage had been executed, and we think that the case is not different from what it would have been if Phelps had seen the mortgage in the hands of the holder. St. John v. Conger, 40 Ill. 535.

It is true that even then the mortgage would not appear to be a lien upon the property, because Holland did not appear to have title. But the existence of the mortgage was a significant fact, and especially as it ran to the very person who appeared to be the owner of the land at the time it was made, and from whose heirs Phelps proceeded at once to obtain a deed. The inference, we think, would necessarily arise, in any person's mind possessed of ordinary intelligence, that Brown sold the land to Holland, and that there had been an omission either to make a deed or record it if made. Now, Phelps knew that if this was so Holland became the equitable owner; that the mortgage bound the equitable interest; and that the holder of the note which the mortgage was given to secure must be claiming a mortgage interest. Our opinion, then, is that Phelps saw enough to put him upon inquiry, and that he was chargeable with knowledge of the outstanding mortgage interest.

The plaintiff claims that the same result should be reached by reason of the character of the deed under which Phelps claims. His position is that the deed is, in effect, a mere quitclaim, and that Phelps stands in no better position than his grantors, who must be regarded as charged with all that the intestate knew. The question raised upon the character of the deed is not quite free from difficulty, and, as it is not necessary to determine it, we omit to do so. Possibly the court below thought that the deed to Phelps operated as a discharge of the mortgage, upon the theory that he had a right to assume that it was made by those who had become owners of the mortgage. The evidence, however, shows that Phelps applied to the grantors for a conveyance to him, upon the theory that they had become the owners of the property, and not incumbrancers, and what he paid he paid simply as a purchaser from the owners. It does not appear to have occurred to any one that there was to be a discharge of the mortgage effected by the deed. Possibly the court below thought that the plaintiff did not appear to be the owner of the note and mortgage. While the note and mortgage were acquired by plaintiff by purchase at a sheriff's sale, the evidence shows that he had previously taken them as security. It may be that it was thought that he had taken them in trust, and that he could not acquire title to trust property by a purchase of the same. It is true enough that if a trustee becomes a buyer at his own sale the beneficiary may, at his option, avoid the sale. But the sale in this case was not the trustee's sale. He had deposited the notes and mortgage in bank, where they were seized upon execution. The sale was made by a judgment creditor, through the sheriff. The plaintiff did not conduct the sale, nor procure it, nor was he charged with any responsibility in regard to it. The sale was made in pursuance of the sheriff's levy, and not in the execution of any trust which the plaintiff had assumed.

We think that the decree must be reversed.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ADMIRALTY—Criminal Jurisdiction—Federal Courts.——The criminal jurisdiction of the federal courts does not extend to the great lakes and their connecting waters, though congress may provide for offenses committed on American vessels anywhere.—*Ex parte Byers*, U. S. D. C. (Mich.), Oct. 10, 1887; 32 Fed. Rep. 404.

2. ADMIRALTY — Territorial Jurisdiction — Hudson River.——The limits of the jurisdiction of the federal district courts for New Jersey and the southern district of New York over the Hudson river, west of Manhattan island, are coincident with the boundaries of the jurisdiction of those two States.—*The Norma*, U. S. D. C. (N. Y.), July 1, 1887; 32 Fed. Rep. 411.

3. APPEAL—Briefs— Dismissal. —— Where a case is submitted on briefs, to be filed in a certain time, and appellant makes no effort to do so, the case will be dismissed.—*Howlett v. Tuttle*, S. C. Colo., Oct. 18, 1887; 15 Pac. Rep. 342.

4. APPEAL — Certiorari. —— Under some circumstances, where it appears that important parts of the record have been omitted, the appellate court will, of its own motion, award a *certiorari*, but not ordinarily.—*Fisher v. McNulty*, S. C. App. W. Va., Sept. 23, 1887; 3 S. E. Rep. 593.

5. APPEAL—Harmless Errors.—— Where it appears that the errors complained of did not injure the appellant, the decision will not be disturbed.—*Arnaz v. Gassen*, S. C. Cal., Oct. 29, 1887; 15 Pac. Rep. 316.

6. APPEAL—Notice— Attorney. —— An appeal from the superior court must be initiated by a notice signed by appellant's attorney of record in that court, and it is immaterial that he is not an attorney of the appellate court.—*Beardsley v. Frame*, S. C. Cal., Oct. 29, 1887; 15 Pac. Rep. 310.

7. ASSAULT AND BATTERY—Self-defense. —— A civil action for assault and battery will lie whenever a criminal one will, and the plea of self-defense is the same in each case.—*Thomason v. Gray*, S. C. Ala., June 29, 1887; 3 South. Rep. 38.

8. ATTORNEY—Lien—Enforcement. —— Where a decree awards to a plaintiff an interest in land, it is subject to a lien for the fee of his attorneys, under Colorado law, which may be enforced by a suit in equity to determine the contested questions of their employment and the amount of their fee.—*Fillmore v. Wells*, S. C. Colo., Oct. 18, 1887; 15 Pac. Rep. 343.

9. BILLS AND NOTES—Fraud.——The fact that a person signs a note read to him without reading it, does not excuse the fraud practiced by one who read the note to him, but omitted a material portion.—*Brooks v. Matthews*, S. C. Ga., April 19, 1887; 3 S. E. Rep. 627.

10. BILLS AND NOTES—Liability—Parol Evidence.—— Between the original parties to a bill of exchange, parol testimony is admissible to show who is the maker, or in what character the bill was signed, when anything appears thereon to suggest a doubt on that point.—*Martin v. Smith*, S. C. Miss., Oct. 24, 1887; 3 South. Rep. 33.

11. BOND—Appeal — Limit of Liability. —— The recovery on an appeal bond is not confined to its penalty, but may include costs of the suit and damages for the detention of the debt assumed therein.—*Crane v. Andrews*, S. C. Colo., Oct. 18, 1887; 15 Pac. Rep. 331.

12. BOUNDARY—Certainty.——The verdict describing the boundary line between two tracts of land must be specific and certain.—*Foreman v. Redman*, Ky. Ct. App., Nov. 8, 1887; 5 S. W. Rep. 556.

13. CERTIORARI—Remanding Case. —— Where both law and facts are involved in a case heard on *certiorari*, and there is no dispute as to the facts, it is discretionary with the superior court to remand the case or to make a final disposition of it.—*Rome R. Co. v. Ransom*, S. C. Ga., April 7, 1887; 3 S. E. Rep. 626.

14. CONTRACT—Corporation—Illegality. —— Where a contract was made to build a railroad for a company, for which payment was to be made in the stock and bonds of the company, the contractor was discharged from his contract when the company was judicially declared not to exist.—*Vinal v. Continental, etc. Co.*, U. S. C. C. (N. Y.), Oct. 20, 1887; 32 Fed. Rep. 343.

15. CARRIERS—Lien—Foreclosure.——The affidavit of foreclosure of a common carrier's lien, under Georgia law, must state that a demand of payment was made after the debt became due, or the proceedings may be dismissed.—*Central, etc. Co. v. Sawyer*, S. C. Ga., April 27, 1887; 3 S. E. Rep. 629.

16. CARRIER—Negligence—Damages.——A passenger cannot recover exemplary damages for mental anxiety occasioned by separation from his family, when he was carried beyond his station, when the failure to stop is not shown to have been wilful, and there were no circumstances of malice, insult or oppression.—*Dorrah v. Illinois, etc. Co.*, S. C. Miss., Oct. 24, 1887; 3 South. Rep. 36.

17. CRIMINAL LAW—Insanity.—— Under the law of Texas, an inquiry may be ordered by the court as to the sanity of defendant after his conviction. No appeal lies from the judgment upon such inquiry.—*Darnell v. State*, Tex. Ct. App., Oct. 12, 1887; 5. S. W. Rep. 522.

18. CRIMINAL PRACTICE—Counsel— Witness.——Where one impeaches his own witness, it must appear that the witness testified differently from what was expected of him and that his evidence was adverse to the party who called him. Counsel may remark upon the fact that a witness is a pardoned convict. A pardon restores competency, but not credibility.—*Bennett v. State*, Tex. Ct. App., Oct. 22, 1887; 5 S. W. Rep. 527.

19. CRIMINAL PRACTICE— Evidence — Character. —— The statute of Texas, requiring a prosecuting attorney to make a statement to the jury of what he expects to prove, is merely directory. If the accused puts his character in issue, the prosecution may rebut by evidence the general character, but not of specific acts.—*Holsey v. State*, Tex. Ct. App., Oct. 22, 1887; 5 S. W. Rep. 523.

20. CRIMINAL PRACTICE—Homicide—Instructions.—— It is improper for the court, in a trial for murder, that the defendant does not dispute that he kill the deceased, when no such admission was made at the trial nor implied in the defense.—*People v. Lee Chuck*, S. C. Cal., Nov. 1, 1887; 15 Pac. Rep. 322.

21. CRIMINAL PRACTICE— Misdemeanor—Appeal.—— In cases of misdemeanor, where a justice of the peace has exclusive original jurisdiction, the superior court has no jurisdiction, when defendant waives trial and the justice binds him over to appear before that court.—*State v. Lackman*, S. C. N. Car., Oct. 31, 1887; 3 S. E. Rep. 635.

22. CRIMINAL PRACTICE—New Trial.—— A motion in the trial court for a new trial, after judgment has been affirmed in the appellate court, on the ground that defendant's counsel at the first trial had abandoned him without notifying him of such intention prior to the adjournment of the court and on the ground of newly-discovered evidence, which was merely cumulative, does not come under Code Ga. § 3721.—*Cobb v. State*, S. C. Ga., April 26, 1887; 3 S. E. Rep. 628.

23. CRIMINAL PRACTICE—Sentence—Commutation.—— The right of a prisoner to a discharge must be gov-

erned by the laws in force when he was sentenced.—*Ex parte Clawson*, S. C. Utah, Nov. 5, 1887; 15 Pac. Rep. 328.

24. CUSTOMS — Bills of Lading—Indictment. —— An oath, on entering merchandise at the custom house that the affiant does not know of any bills of lading other than those produced by him, is not falsified because copies thereof exist in accordance with commercial usage under the law.—*United States v. Harrison*, U. S. D. C. (Cal.), 1888; 32 Fed. Rep. 386.

25. DAMAGES—Exemplary Damages—Evidence.——A corporation may, in a proper case, recover exemplary damages. The declaration of a servant of a corporation with reference to matters within the scope of his authority are admissible in evidence against the corporation.—*International, etc. Co. v. Telephone, etc. Co.*, S. C. Tex., Oct. 21, 1887; 5 S. W. Rep. 517.

26. DEED—Description — Identification. —— A deed described land as "all that tract or parcel of land situate in said county and bounded as follows: Adjoining the lands of B, H, M, T and others:" *Held*, that the description was sufficiently definite, and the land could be identified by parol.—*McLawhorn v. Worthington*, S. C. N. Car., Oct. 24, 1887; 3 S. E. Rep. 633.

27. DESCENT AND DISTRIBUTION. —— In Tennessee, the property of one who dies without issue vest in his brothers and sisters of the whole and half blood living at the time of his death or born within ten calendar months thereafter.—*Melton v. Davidson*, S. C. Tenn., Oct. 28, 1887; 5 S. W. Rep. 530.

28. DIVORCE—Wilful Desertion.—— Where the husband wrote to his wife requesting her to return to him, but she, though she met him several times on the street, said and did nothing for more than a year, when she wrote she was willing to live with him in a fit and proper place, but would not condone any offense he might have committed: *Held*, that the court was justified in finding wilful desertion on her part.—*Carey v. Carey*, S. C. Cal., Oct. 29, 1887; 15 Pac. Rep. 313.

29. DOWER—Legacy- Acceptance.——It must appear that the widow accepted the legacy left her in lieu of dower before her claim for dower can be defeated.—*Aldridge v. Aldridge*, S. C. Ga., May 1, 1887; 3 S. E. Rep. 619.

30. EJECTMENT—Death of Lessor—Administrator.—— In Georgia, ejectment cannot be maintained when the sole lessor of the plaintiff died before the suit was brought. It is the better practice for an administrator to obtain an order of sale from the court of ordinary before suing the heir in ejectment.—*Head v. Driver*, S. C. Ga., April 12, 1887; 3 S. E. Rep. 621.

31. EJECTMENT—Widow—Heirs.—— Where a widow claims land as a donee of her husband, ejectment will lie against her at the suit of the grantee of the heirs who controverts her title.—*Kellogg v. Gilfillan*, S. C. Penn., Oct. 4, 1887; 10 Atl. Rep. 888.

32. EQUITY—Injunction— Dissolution. —— A preliminary injunction will not be dissolved upon motion for want of equity when it appears by the bill that the defendant, executor or trustee, is wasting trust funds. An injunction has been granted to restrain such waste.—*Emson v. Ivins*, N. J. Ct. Ch., October, 1887; 10 Atl. Rep. 877.

33. EQUITY—Injunction—Waste.——A court of equity has no jurisdiction of an action to recover for waste; its power is limited to preventing waste by injunction.—*Lippincott v. Barton*, N. J. Ct. Ch., October, 1887; 10 Atl. Rep. 884.

34. EQUITY—Marshalling Assets.——A creditor having two funds open to him may resort to either, but if he takes the only fund open to another creditor, he must place the other fund at the disposal of such creditor.—*Hudkins v. Ward*, S. C. App. W. Va., Sept. 23, 1887; 3 E. Rep. 600.

35. EQUITY—Mistake—Relief.——Where a widow rescinded a contract relative to her dower, in ignorance of her rights, she was entitled to relief in equity.—*Harlow v. Cleghorn*, S. C. Ga., April 9, 1887; 3 S. E. Rep. 618.

36. EQUITY PRACTICE—Supplemental Bill.——A court of equity will, upon application, grant leave to plaintiff to file a supplemental bill, although it may be doubtful whether he would be entitled to the relief prayed for in such bill.—*Oregon, etc. Co. v. Northern, etc. Co.*, U. S. C. C. (N. Y.), Aug. 20, 1887; 32 Fed. Rep. 428.

37. ERROR—Writ of—Federal Question—Affirmance.—A writ of error from the United States Supreme Court should not be allowed if it appears on the record that the decision of the federal question was plainly right and in accordance with prior decisions. A motion to affirm may be united with a motion to dismiss the writ of error, and such motion may be granted on the dismissal.—*The Anarchists' Case*, U. S. S. C., Nov. 2, 1887; 8 S. C. Rep. 22.

38. ERROR—Writ of—Motion in Court. —— When a motion is made in open court for a writ of error to the State supreme court, the court must ascertain by examination of the record whether any questions, cognizable in the United States Supreme Court on appeal were made and decided, and whether they were such as to make it proper to bring up the judgment for re-examination.—*The Anarchists' Case*, U. S. S. C., Oct. 24, 1887; 8 S. C. Rep. 21.

39. ESTOPPEL—Agreement — Partition. —— A and B partitioned, by agreement, land which they had jointly purchased, and which had been conveyed to A as guardian of his children and to B as trustee for his wife: *Held*, that in a suit for partition by A, as guardian, against B, as trustee, they were estopped to impeach the partition already made by them.—*Thomas v. Peyton*, S. C. Ga., April 29, 1887; 3 S. E. Rep. 630.

40. EVIDENCE—Authentication of Foreign Statutes.—A copy of a decree is sufficiently verified by the affidavit of a witness that he compared the copy with the original and found it correct. The statutes of sister States are sufficiently authenticated in Texas by the production of the volume of statutes printed by authority.—*Harvey v. Cummings*, S. C. Tex., Oct. 14, 1887; 5 S. W. Rep. 513.

41. EVIDENCE—Declarations—Res Gestæ—New Trial.—In an action for damages, statements made by a servant after the occurrence, form no part of the *res gestæ*, and are inadmissible. If such statements are admitted over objections and may have had weight with the jury, they constitute ground for a new trial.—*Sherman v. Delaware, etc. Co.*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 616.

42. EVIDENCE—Entries — Declarations Against Interest. — Entries made by a bookkeeper without knowledge on his part, but by direction of his employer and not in the presence of the person charged, are not admissible against that person. Declarations or entries against his interest by a party since deceased are admissible between third parties.—*Hart v. Kendall*, S. C. Ala., July 21, 1887; 3 South. Rep. 41.

43. EVIDENCE—Trust—Declarations.——In a suit to establish a trust, testimony of facts, which go to show a recognition of the trust and a step in the direction of giving it effect, are admissible.—*Smiley v. Pearce*, S. C. N. Car., Oct. 24, 1887; 3 S. E. Rep. 631.

44. EXECUTION—Exemption—Parties.——One claiming an exemption for his wife and children, whom he names, cannot complain that they are not parties to the proceedings, when he is a party.—*King v. Skellie*, S. C. Ga., April 28, 1887; 3 S. E. Rep. 614.

45. EXECUTION — Priority. —— An execution levied upon personalty in one county, and founded on a judgment rendered in another county, has priority over a mortgage executed in the former county after such judgment was rendered.—*Cecil v. Carson*, S. C. Tenn., Nov. 1, 1887; 5 S. W. Rep. 532.

46. EXECUTORS —Claims Against Estate—Limitation. ——Where A is garnished as a debtor of B and dies pending the suit, such claim against A's estate is not barred because not registered in the probate court within one year after administration granted.—*Harris v. Hutcheson*, S. C. Miss., Oct. 24, 1887; 3 South. Rep. 34.

47. EXECUTORS—Evidence—Deceased Person.——An executor is liable for rent and interest thereon for lands belonging to the estate and occupied by him. A co-executor is not responsible for such rent or interest. An executor cannot testify in his own behalf as to transactions between him and his testator in the latter's life-time.—*Tichenoe v. Tichenoe*, N. J. Prerog. Ct., Oct. 18, 1887; 10 Atl. Rep. 867.

48. EXEMPTION—Homestead—Personalty.——Though a party conveys land to his wife in fraud of his creditors, he is not thereby deprived of his homestead rights therein. One who turns his money into real estate is entitled to the homestead but not the personal property exemption.—*Dortch v. Benton*, S. C. N. Car., Oct. 31, 1887; 3 S. E. Rep. 638.

49. FRAUDS —Fraudulent Representations.——Where one, by false representations, induces the owner of land to believe it is of little value and to sell it to him for very much less than its real value, the deed may be canceled.—*Havlin v. Reed*, Ky. Ct. App., Nov. 5, 1887; 5 S. W. Rep. 554.

50. FRAUD — Indictment. —— One who supports a claim against the United States by affidavits which he knows to be false is guilty of a fraud for which he may be indicted under U. S. Rev. Stat. § 5438.—*United States v. Jones*, U. S. D. C. (S. Car.), October, 1887; 32 Fed. Rep. 482.

51. FRAUD—Rescission.——Where a son, by false and fraudulent representations, induces his mother to execute a deed conveying her property which she did not intend to convey, she is entitled to rescission of the contract and a re-conveyance of the land.—*Tuffts v. Tuffts*, U. S. S. C., Oct. 31, 1887; 8 S. C. Rep. 54.

52. FRAUD — Statute of Frauds. —— The following memorandum was held insufficient to satisfy the statute of frauds: "You may place the gas fixtures I selected to-day. The dining-room fixtures may as well be changed as talked over with the salesman who showed me the goods. Please put them up in fine shape promptly as possible."—*Shelley v. Whitman*, S. C. Mich., Oct. 27, 1887; 34 N. W. Rep. 879.

53. GARNISHMENT—Bailee.——When A holds money, placed in his hands by B to pay to C, which C has not directed and when A has not promised to pay the money to C, A can be garnished as the debtor of B.—*Cox v. Reeves*, S. C. Ga., April 14, 1887; 3 S. E. Rep. 620.

54. GARNISHMENT — Service —Return.——Where the return on a garnishment shows a service on A and B by reading to each of them the within writ of garnishment and summoning them to appear and answer as this writ directs, such return is defective, when A's name was not in the writ, and does not warrant a judgment by default.—*Semmes v. Patterson*, S. C. Miss., Oct. 24, 1887; 3 South. Rep. 35.

55. HIGHWAYS—Costs.——When an applicant for a new road or highway is required to give bond for costs and refuses to do so the county court may render judgment for costs and dismiss his application.—*Meruit v. Pryor*, S. C. Tenn., Nov. 1, 1887; 5 S. W. Rep. 534.

56. HOMICIDE — Manslaughter.——Where defendant rode to where deceased was at work and an altercation ensued, and deceased left defendant and started to the house and was shot twice: *Held*, that the court should instruct on the subject of manslaughter and not self-defense.—*Arrellano v. State*, Tex. Ct. App., Oct. 22, 1887; 5 S. W. Rep. 526.

57. INJUNCTION—Lease.——An injunction will not be granted to restrain the owner of a lot from trespassing upon it at the instance of one who claims a verbal lease of the lot, but has really only a right of way over it.—*Harper v. McElroy*, N. J. Ct. Chan., October, 1887; 10 Atl. Rep. 879.

58. INTERPLEADER — Mortgage. —— One who has assumed the payment of a mortgage filed a bill of all claimants of the fund to interplead. *Held*, that those claimants whose demands were undisputed should not have been made parties to the action.—*Varrian v. Berrien*, N. J. Ct. Chan., Oct. 1887; 10 Atl. Rep. 875.

59. INTEREST—Contract.——Where by a contract of sale, interest is not to be charged against the buyer the seller cannot in making up the account charge such interest as against instalment payments. — *Mendel v. Paepke*, S. C. Wis., Nov. 1, 1887; 34 N. W. Rep. 912.

60. INTERVENTION —Railroad Mortgage — Foreclosure. ——When a bill to foreclose a mortgage and against those seeking to enforce judgments, has been taken *pro confesso* as to the latter, parties who claim an interest in the property, a railroad acquired after the jurisdiction of the federal court has attached, as being the parties for whom a sale and purchase thereof in the State court were had, are entitled to intervene.—*Farmer's, etc. Co. v. Texas, etc. R. Co.*, U. S. C. C. (Tex.), 1887; 32 Fed. Rep. 359.

61. INTOXICATING LIQUOR —License—Proof.——In an action for selling intoxicating liquor without license, defendant must prove the existence of the license though it be of record.—*State v. Emery*, S. C. N. Car., Oct. 31, 1887; 3 S. E. Rep. 636.

62. INTOXICATING LIQUORS—Local Laws.——An ordinance of a city, prohibiting the keeping of any place for selling or giving away liquors, is valid.—*Ex parte Campbell*, S. C. Cal., Oct. 31, 1887; 15 Pac. Rep. 318.

63. JUDGMENT—Default—Marriage.——In an action to set aside an action rendered by default for nullity of marriage, *held* that if the plaintiff had no grounds upon which to resist the decree of nullity of marriage she has no cause of action to set aside the default.—*Blank v. Blank*, N. Y. Ct. App., Oct. 11, 1887; 13 N. E. Rep. 615.

64. JUDGMENT — Foreign Judgment — Fraud.——The judgment of a State court of competent jurisdiction duly authenticated is conclusive as to the subject-matter. But fraud in obtaining such judgment may be shown in an action upon it by proper pleadings.—*Keeler v. Elston*, S. C. Neb., Nov. 2, 1887; 34 N. W. Rep. 891.

65. JUDGMENT—Res Adjudicata.——Where in a State court judgment is rendered against three defendants and in favor of one and upon appeal by three judgments was arrested as to them. *Held*, in an action on the same cause in a federal court the decision in the State court in favor of the one defendant is conclusive as to him *res adjudicata*.—*Block v. Price*, U. S. C. C. (Mo.), Oct. 14, 1887; 32 Fed. Rep. 447.

66. JUDICIAL SALES — Purchaser — Redemption. —— Where A buys property at a judicial sale, of which the creditor afterwards sells equity of redemption, which last sale the first purchaser forbade at the sale, and A obtains his deed in due time, A has the legal title.—*Stacey v. Holiday*, Ky. Ct. App., Nov. 1, 1887; 5 S. W. Rep. 481.

67. JURISDICTION — Claims Against United States—States.——The court of claims has jurisdiction of a claim by a State against the United States arising under an act of congress. The direct tax of August 5, 1861, created no liability on the part of the States.—*United States v. Louisiana*, U. S. S. C., Oct. 24, 1887; 8 S. C. Rep. 17.

68. LANDLORD AND TENANT —Rent—Maturity.——An attachment for rent for the year 1886, issued in October, 1886, should be dismissed on plea in abatement, when the papers do not show when the rent matured, under Alabama law.—*Dozier v. Robinson*, S. C. Ala., June 29, 1887; 3 South. Rep. 45.

69. LIBEL AND SLANDER—Wealth—Mitigating Circumstances.——Only matters known to the defendant before the slanderous words were spoken can be shown in mitigation of damages in a suit for slander. Testimony as to the wealth of the defendant is admissible in such a suit.—*Barkly v. Copeland*, S. C. Cal., Oct. 31, 1887; 15 Pac. Rep. 307.

70. LICENSE — Modification. —— When a license is given by letter to a third party, a subsequent modification by parol through that third party is effective.—*Colcord v. Carr*, S. C. Ga., Feb. 26, 1887; 3 S. E. Rep. 617.

71. LIEN—Landlord. —— An execution creditor of a tenant, is liable for all property taken under his execution from the premises to the landlord, who has a lien thereon for advances made, though the tenant has other property on the premises sufficient to protect the

landlord.—*Wilkes v. Adler*, S. C. Tex., Oct. 28, 1887; 5 S. W. Rep. 497.

72. LIMITATIONS — Husband and Wife. —— Where a husband buys supplies for family use and gives his note therefor, an action against the wife for the same goods is not barred until the statute has run against the husband's note.—*Philips v. Kirby*, S. C. Iowa, Oct. 27, 1887; 34 N. W. Rep. 855.

73. LIMITATIONS — Estoppel — Statute. ——Under the statutes of limitations of California a debtor is not estopped from pleading the statute because he absented himself from the State under an assumed name. The California statute of limitation enumerates all the exceptions to its operation which it permits.—*Chemical Nat. Bank v. Kissane*, U. S. C. C. (Cal.), Oct. 3, 1887; 32 Fed. Rep. 420.

74. LIMITATIONS — Indorser after Maturity. —— The statute of limitations begins to run against an indorser of a note, indorsed after maturity, from the time of the indorsement.—*Graham v. Roberson*, S. C. Ga., May 9, 1887; 3 S. E. Rep. 611.

75. LIMITATIONS — Judgments — Revival. —— Where the statutes of limitations has begun to run, it is not suspended by the subsequent death of either of the parties. A judgment, whereon over five years have elapsed since the return of the last execution during the life of the execution debtor, can only be revived, during the remainder of the ten years allowed by law, against the personal representative.—*Handy v. Smith*, S. C. App. W. Va., Sept. 23, 1887; 3 S. E. Rep. 604.

76. LIMITATION—Heir—Debt of Ancestor.——Where a personal judgment is rendered against heirs for the debt of their ancestor, the statute of limitations begins to run from the time of the judgment.—*Norton v. Marksberry*, Ky. Ct. App., Oct. 4, 1887; 5 S. W. Rep. 482.

77. MARITIME LIEN — Master — Foreign Vessel. —— Where A contracts with B to act as master of his vessel, both parties being American citizens, though the vessel has a British register, which A learns subsequently, as between these parties the vessel is American, and A does not acquire a lien for his wages under the British act, which he can enforce *in rem*.—*Chisholom v. The J. L. Pendergast*, U. S. C. C. (N. Y.), July 20, 1887; 32 Fed. Rep 415.

78. MARITIME LIEN—Repairs—Pilots.——There is no maritime lien in favor of material-men for repairs on foreign vessels ordered by the charterers, American citizens. Pilots have a lien for their services to such vessels.—*The Pirate*, U. S. D. C. (Md.), July 2, 1887; 32 Fed. Rep. 486.

79. MASTER AND SERVANT —Superior—Outside of Employment.——When a servant is injured in performing acts outside of his regular employment under the orders of a superior, to whom he is subject, the master is not discharged from liability, if such was the custom in his business. — *East Line, etc. Co. v. Scott*, S. C. Tex., Oct. 28, 1887; 5 S. W. Rep. 501.

80. MORTGAGE.——One who has assumed for a valuable consideration to pay off a mortgage upon land, cannot assert title to the property as against the person to whom he assumed the obligation to pay.—*Probstfield v. Czizek*, S. C. Minn., Nov. 8, 1887; 34 N. W. Rep. 896.

81. MORTGAGE—Assignment — Estoppel.——Where a mortgage has been assigned and the whole debt had become due because of failure to pay interest, neither the mortgagee nor the purchaser could claim that the whole interest had been paid to the mortgagee before the assignment.—*Newton v. Boyer*, N. J. Ct. Chan., Oct., 1887; 10 Atl. Rep. 876.

82. MORTGAGE — Authentication. ——In Kentucky, a deputy clerk may take the acknowledgment of deeds and mortgages, and if he omit to write out and sign the certificate the clerk may do so.—*Chaney v. American, etc. Bank*, Ky. Ct. App., Nov. 1, 1887; 5 S. W. Rep. 551.

83. MORTGAGE—Death of Mortgagor — Power of Sale. ——A power of sale contained in a mortgage of real estate, is revoked by the death of the mortgagor, and the mortgagor's heirs must be made parties to the proceedings to foreclose.—*Johnson v. Johnson*, S. C. S. Car., Oct. 6, 1887; 3 S. E. Rep. 606.

84. MORTGAGE — Description.——A mortgage which failed to mention the block in which the lot was located, is insufficient for uncertainty of description and invalid against a subsequent mortgage.—*Stead v. Grosfield*, S. C. Mich., Oct. 20, 1887; 34 N. W. Rep. 871.

85. MORTGAGES—Rents and Profits.——A mortgagee in possession is liable for rents and profits, and his liability is not affected by the fact, that the judgment of a creditor, made a party to a foreclosure suit, was rendered long after possession was taken.— *Mullalieu v. Wickham*, N. J. Ct. Chan., Oct., 1887; 10 Atl. Rep. 880.

86. MUNICIPAL CORPORATIONS—Assent of Voters.—— A law, that the assent of two-thirds of the voters of a municipality to the issue of bonds shall be determined as to numbers by the vote cast at the last previous election, is constitutional.—*Bell v. Americus*, S. C. Ga., April 27, 1887; 3 S. E. Rep. 612.

87. MUNICIPAL CORPORATIONS — Taxation — Assessments. ——The powers, duties and liabilities of municipal corporations, under the statutes of Kentucky, defined and set forth, the powers of such corporations to tax and assess lots for public improvements.—*Nevin v. Roach*, Ky. Ct. App., Nov. 3, 1887; 5 S. W. Rep. 546.

88. MUNICIPAL CORPORATION—Taxation—Statute.—— Construction of the statutes of New Jersey, relating to the sinking fund of the city of Newark, and the power of that city to levy taxes and assessments to secure a supply of water.—*State v. City of Newark*, S. C. N. J., Nov. 4, 1887; 10 Atl. Rep. 881.

89. MUNICIPAL CORPORATIONS—Vacating Streets.—— Where a city vacates certain streets, as allowed by its charter, a bill for an injunction against such vacation, and against the use of such vacated streets for a depot, is properly dismissed when the complainant alleges no special individual injury therefrom.—*Whitsett v. Union Depot Co.*, S. C. Colo., Oct. 18, 1887; 15 Pac. Rep. 339.

90. NEGLIGENCE—Death of Husband—Damages. —— In an action for causing the death of plaintiff's husband by negligence, the jury, in assessing damages, can consider the age of the husband, his health and habits of life and capacity to earn money.—*Hogue v. Chicago, etc. R. Co.*, U. S. C. C. (Mo.), Oct., 1887; 32 Fed. Rep. 365.

91. NEGOTIABLE INSTRUMENT — Corporation. ——The possession of a note purporting to be indorsed by a corporation, is *prima facie* evidence that the person who indorsed it had a right to do so.—*National Bank v. Mallan*, S. C. Minn., Nov. 7, 1887; 34 N. W. Rep. 901.

92. NEGOTIABLE INSTRUMENTS — Laches—Set-off.— A bank check payable in current funds is negotiable. Delay in presenting a bank check does not enable the drawee to plead against the holder a set-off against the drawer if, when the check is presented, there are still funds of the drawer in the hands of the drawee.—*Bull v. First Nat. Bank*, U. S. S. C., Oct. 31, 1887; 8 S. C. Rep. 62.

93. NEGOTIABLE PAPER—Indorsement—Waiver—Conflict of Laws.——An indorser on a promissory note which contains a stipulation that indorsers waive presentment and demand, is liable upon it absolutely. The laws of a State in which a note is made payable therein govern the liability of an indorser.—*Dunnigan v. Stevens*, S. C. Ill., Sept. 27, 1887; 13 N. E. Rep. 651.

94. QUIETING TITLE—Possession—Evidence.——In an action to quiet title, when plaintiff testifies that he took possession to take care of the property under the same old agreement, prior leases to plaintiff are admissible to show whether he re-entered under the terms of the leases or under a parol agreement.—*Fredericks v. Judah*, S. C. Cal., Oct. 27, 1887; 15 Pac. Rep. 305.

95. PARTITION—Jurisdiction—Life Estate.——In Kentucky, the county court has equity jurisdiction in matters of partition. A partition will not be granted during the life tenant's life when the result would be to throw inequitable burdens upon the estate of one of the parties.—*Hopkins v. Crouch*, Ky. Ct. App., Nov. 8, 1887; 5 S. W. Rep. 557.

96. PARTNERSHIP.——One does not form a partnership with another in such a sense as will make him liable for antecedent debts of his partner, unless he gives an express promise to that effect.—*Miller v. Stone*, S. C. Wis., Nov. 1, 1887; 34 N. W. Rep. 907.

97. PARTNERSHIP—Accounting.——Where the administrator of one partner files a bill for accounting against the executrix of the other partner, and it appears that plaintiff's intestate never recognized the partnership as existing, the bill was properly dismissed.—*Davis v. Key*, U. S. S. C., Oct. 31, 1887; 8 S. C. Rep. 55.

98. PARTNERSHIP—Accounting—Attachment.—— The relations between partners can only be settled by an accounting under the orders of a court of competent jurisdiction. When an action for accounting is pending, an attachment issued by one partner against the other may be stayed by the court to avail the result of such accounting.—*Shearer v. Francis*, Ky. Ct. App., Nov. 8, 1887; 5 S. W. Rep. 559.

99. PARTNERSHIP — Action Against — Judgment.—— Where a partnership is sued and only one partner served, it is error to render a judgment against him alone.—*Craig v. Smith*, S. C. Colo., Oct. 1887; 15 Pac. Rep. 337.

100. PATENTS—Infringement—Injunction. —— Where a patent has been long recognized by the trade, and a large number of licenses have been taken therefor voluntarily and in settlement of litigation, and there has been a *quasi* adjudication in its favor, and the granting of an injunction will do little injury, whereas a refusal will work great injury, the writ should issue.—*Hat Sweat M. Co. v. Davis S. M. Co.*, U. S. C. C. (N. Y.), Oct. 14, 1887; 32 Fed. Rep. 401.

101. PATENT — Injunction.——A preliminary injunction will be granted to restrain infringements upon a patent which will soon expire.—*Westinghouse, etc. Co. v. Carpenter*, U. S. C. C. (Iowa), Oct. 22, 1887; 32 Fed. Rep. 484.

102. PATENT—Reissue.——A reissued patent must be confined to the invention specified and claimed in the original patent. A claim for an invention mentioned but not claimed in the original patent, is void.—*Parker, etc. Co. v. Yale, etc. Co.*, U. S. S. C., Oct. 31, 1887; 8 S. C. Rep. 38.

103. PATENTS — Reissue — Subcombinations.——Subcombinations may be claimed in reissues of patents, if they are shown in the original as performing the same function. Reissue of April 9, 1878, to J. Hyslop, jr., describing a convex-faced bender plate, is broader than the patent of Dec. 24, 1872, and so far void, but in its bending-dies is valid.—*Jenkins v. Stetson*, U. S. C. C. (Mass.), Sept. 20, 1887; 32 Fed. Rep. 398.

104. PAYMENTS — Application. ——The proceeds of mortgaged property cannot be applied to the payment of any other debt, except by consent of both parties, so with a payment in cotton, on which the creditor has a landlord's lien.—*Strictland v. Hardie*, S. C. Ala., July 12, 1887; 3 South. Rep. 40.

105. PRINCIPAL AND AGENT—Commissions—Rescission. ——Where an insurance company cancelled a policy, and requested its agent to return to the insured his commissions, less the commission on the earned premium, which he did, the agent had no right of action against the company for his commissions so returned —*Devereux v. Insurance Co.*, S. C. N. Car., Oct. 31, 1887; 3 S. E. Rep. 639.

106. PLEADING — Abatement.——It is competent to join matters in bar and abatement in the same plea. Where a defendant pleads in abatement the pendency of another action for the same cause, the plaintiff may dismiss that action and state that dismissal in his answer to defendant's plea.—*Page v. Mitchell*, S. C. Minn., Oct. 28, 1887; 34 N. W. Rep. 896.

107. PLEADING—Another Suit Pending—Consolidation. ——An answer may aver facts showing that a former suit is pending, substantially between the same parties and for the same cause. Where two suits can be consolidated, it should be done, or one should be stayed till the other is determined.—*Crane v. Larsen*, S. C. Oreg., Oct. 25, 1887; 15 Pac. Rep. 326.

108. PLEADINGS —Complaint—Rent.——A complaint, that defendant rented and leased two rooms from the plaintiff at so much a month from a certain date, payable in advance, none of which money he has paid, states a cause of action.—*Marix v. Stevens*, S. C. Colo., Oct. 18, 1887; 15 Pac. Rep. 350.

109. PLEADING—Demurrer—Trial.——When upon demurrer sustained the answer is amended, but at the trial defendant is given full opportunity to present his case, the ruling on the demurrer becomes immaterial.—*Anderson v. Citizen's Bank*, S. C. Tex., Oct. 21, 1887; 5 S. W. Rep. 503.

110. PLEADING —Objection After Judgment.——The claim after judgment, that the petition is insufficient, can only be sustained under Colorado laws when the facts contained therein, though well stated, constitute no cause of action.—*Rhodes v. Hutchins*, S. C. Colo., Oct. 18, 1887; 15 Pac. Rep. 329.

111. PRACTICE — Exceptions—Bill of—Signature—Verdict on Appeal.——When a bill of exceptions, in case of a refusal by the judge, is signed by two attorneys, they must both be disinterested. When, on appeal from a justice, a verdict is given beyond the justice's jurisdiction, and the plaintiff does not offer to remit, the suit should be dismissed.—*Thornily v. Pierce*, S. C. Colo., Oct. 18, 1887; 15 Pac. Rep. 335.

112. PRACTICE—Exceptions—New Trial—Appeal.—— Exceptions taken after verdict are too late. Objections that the evidence is insufficient should have been made in the trial court and will not be considered on appeal. —*Barker v. Todd*, S. C. Minn., Oct. 28, 1887; 34 N. W. Rep. 895.

113. PRACTICE · Federal Courts —Equitable Defense. ——The practice of State courts of admitting equitable defenses to legal actions is not permitted in federal courts. A so-called equitable defense, which amounts in facts "to no consideration," is a legal defense and admissible in a federal court.—*Herklotz v. Chase*, U. S. C. C. (N. Y.), Sept. 30, 1887; 32 Fed. Rep. 433.

114. PRACTICE — Notices — Changing Pleadings.—— Under Colorado law, it is error to allow a defendant, after the time for answering has passed, to withdraw a demurrer and to file an answer and cross-demand.—*Mallan v. Higenbotham*, S. C. Colo., Oct. 18, 1887; 15 Pac. Rep. 352.

115. PRACTICE—Venue—Change of—Costs.——After a county court has ordered a change of venue, a subsequent order, requiring the payment of accrued costs to perfect the change, is invalid.—*South Pueblo N. P. Co. v. Moore*, S. C. Colo., Oct. 18, 1887; 15 Pac. Rep. 333.

116. PUBLIC LANDS — Disputed Jurisdiction. —— A grant of land by a government which exercises *de facto* jurisdiction over that territory is void against the rightful government.—*Coffee v. Groover*, U. S. S. C., Oct. 17, 1887; 8 S. C. Rep. 1.

117. PUBLIC LANDS—Homestead—Cutting Timber.—— One holding public lands under a homestead entry can only cut and sell the timber from those portions of the land being cleared for cultivation or settlement.—*United States v. Murphy*, U. S. C. C. (Mich.), Oct. 1, 1887; 32 Fed. Rep. 376.

118. PUBLIC LANDS — Title —Quitclaim.——After the issue of the receiver's final receipt for public land, the holder thereof may quitclaim the land, and such quitclaim, though unrecorded, will prevail over a quitclaim delivered after the issue of the patent.—*McClung v. Steen*, U. S. C. C. (Minn.), Sept. 12, 1887; 32 Fed. Rep. 373.

119. PUBLIC LANDS—Virginia Reservation—Excess of Land Claimed.——Construction of acts of congress relative to land warrants in the Virginia military reservation and rulings thereupon. A survey of one thousand acres on a warrant of five hundred acres is excessive and void.—*Coan v. Flagg*, U. S. S. C., Oct. 31, 1887; 8 S. C. Rep. 47.

120. QUIETING TITLE—Possession.——In an action to

quiet title the plaintiff must allege and, if denied, prove that he is in actual possession of the land. It is not sufficient to say that he is entitled to possession.—*Smith v. Gatliff*, Ky. Ct. App., Nov. 8, 1887; 5 S. W. Rep. 558.

121. RAILROAD—Master and Servant—Negligence.——If an injury is caused to a servant of a railroad company by the joint negligence of the company and a fellow-servant of the party injured the railroad company is liable in damages.—*Franklin v. Winona, etc. Co.*, S. C. Minn., Nov. 8, 1887; 34 N. W. Rep. 898.

122. REMOVAL OF CAUSES—Bias and Local Prejudice.——Construction of the act of congress relative to the removal of causes from State to federal courts on account of bias and local prejudice. Ruling on the power of the court to inquire into the merits of the affidavit for removal. To what classes of causes the act in question applies.—*Fisk v. Henarie*, U. S. C. C. (Oreg.), Oct. 26, 1887; 32 Fed. Rep. 417.

123. REMOVAL OF CAUSES—Jurisdiction.——A circuit court of the United States has under act of March 3, 1887, no jurisdiction of a cause in which the matter of controversy does not exceed $2,000 exclusive of interest and costs.—*Lazens Ky. v. Supreme Lodge, etc.*, U. S. C. C. (N. Y.), Aug. 20, 1887; 32 Fed. Rep. 417

124. REMOVAL OF CAUSES—Single Controversy.——In an action on a bond against the obligors and his sureties for a money judgment for purposes of removal there is but one controversy, and where the jurisdiction depends upon the citizenship of the parties,the right of removal is governed by the second clause of the second section of the act of 1887.—*Western, etc. Co. v. Brown*, U. S. C. C. (Mo.), Oct. 8, 1887; 32 Fed. Rep. 337.

125. SALVAGE — Contract — Arbitration— Jurisdiction.——A salvage company which in response to a telegram rescued a vessel in distress is entitled salvage although the parties agreed to submit the amount to be paid to arbitration. The supreme court has no jurisdiction to review the amount of an award by salvage unless it is clearly excessive.—*Potomac, etc. Co. v. Barker Salvage Co.*, U. S. S. C., Oct. 24, 1887; 8 S. C. Rep. 33.

126. SCHOOLS — Commissioners — Corporation. —— Commissioners of schools are entitled to pay for their labor as before the act of May 12, 1884, till county superintendants have qualified.—*Picket v. Harrod*, Ky. Ct. App., Oct. 29, 1887; 5 S. W. Rep. 473.

127. TAXATION—Action—Limitation.——An action by a city and county to recover city, county and State taxes, more than seven years after the right of action accrued, is barred. An action to recover a personal judgment on the original tax is subject to the statute of limitations.—*San Francisco v. Luning*, S. C. Cal., Oct. 28, 1887; 15 Pac. Rep. 311.

128. TAXATION — Bond — Action.—— Where the State takes a bond from a tax collector and the county takes another, the county cannot sue on the bond to the State governor in the absence of evidence that the latter bond was intended to secure the county.—*King v. Ireland*, S. C. Tex., Oct. 25, 1887; 5 S. W. Rep. 499.

129. TAXATION —Charities.——Buildings belonging to charitable institutions and not used exclusively for charitable purposes are subject to taxation.—*Morris v. Lone Star Chapter, etc.*, S. C. Tex., Nov. 1, 1887; 5 S. W. Rep. 519.

130. TAXATION—Excessive Assessment.——An excessive assessment for taxation is remediable by application to the board of supervisors and not by a bill in chancery.—*Noxubee Co. v. Ames*, S. C. Miss., Oct. 24, 1887; 3 South. Rep. 37.

131. TAXATION —Pleading—Legislation.——The legislature may prescribe the form of complaint to be used by a city in suing for delinquent taxes.—*Stockton v. Western F. & M. I. Co.*, S. C. Cal., Oct. 29, 1887; 15 Pac. Rep. 314.

132. TAXATION — Sale — Redemption. ——A sale for county taxes of land held by the State under a sale for State taxes passes no title. A stranger cannot redeem land sold for taxes.—*Bradford v. Walker*, Ky. Ct. App., Nov. 5, 1887; 5 S. W. Rep. 555.

133. TAXATION—School Tax.——Construction of Iowa statutes prescribing the mode of levying taxes for the support of schools. Duties of supervisors and school directors in connection with such taxation.—S. C. Iowa, Oct. 28, 1887; 34 N. W. Rep. 870.

134. TRADE-MARK — Bottles — Covers.——Where two parties manufacture a similar article, one may be restrained from using old bottles formerly owned by the other with his name on them, and from using a similar metallic cap of tin to his bottles.—*Sawyer C. B. Co. v. Hubbard*, U. S. C. C. (Mass.), Sept. 12, 1887; 32 Fed. Rep. 388.

135. TRADE-MARK — Royalties —Breach.——Where A has contracted for the exclusive sale of water from B's spring under a certain name for a number of years, he cannot, during the contract, sell other mineral waters under the same name.—*Hill v. Lockwood*, U. S. C. C. (Wis.), June 24, 1887; 32 Fed. Rep. 389.

136. TRESPASS—Cutting Timber—Damages.——Where a party cuts timber on land adjoining his own, which is included in his deed, which timber he uses to fence that land, and ceases to cut so soon as he learns of his mistake, the owner is entitled to only nominal damages.—*Clark v. Hart*, S. C. Miss., Oct. 24, 1887; 3 South. Rep. 33.

137. TRESPASS—Set-off—Statutes.——Taxes paid by a defendant in a trespass case are not the subjects of set-off in Wisconsin; the statute of that State on the subject applies only to actions of ejectment.—*Davidson v. Rountree*, S. C. Wis., Nov. 1, 1887; 34 N. W. Rep. 906.

138. VENDOR — Lien — Credits. ——Where a vendor claims a lien for unpaid purchase money, and receives money, from the purchaser of the land upon execution sale against his vendee, for a release of his lien, the vendee is entitled to be credited with the money so paid.—*Reed v. Hardeman*, S. C. Tex., Oct. 21, 1887; 5 S. W. Rep. 505.

139. VENDOR AND VENDEE—More or Less.——Where land is sold as containing fifty acres, more or less, but on measurement is found to contain only thirty-four and one-half acres, the jury are the judges whether there was fraud or mistake in the purchase.—*Seegar v. Smith*, S. C. Ga., March 31, 1887; 3 S. E. Rep. 613.

140. VENDOR AND VENDEE—Quitclaim Deed—Mistake—Rescission.——An action on a bond for purchase money of land conveyed by quitclaim deed, the grantee is entitled to a rescission of the contract upon re-conveying the land and showing a mistake by both parties as to the grantor's title.—*Goettel v. Sage*, S. C. Penn., Oct. 6, 1887; 10 Atl. Rep. 889.

141. WILL—Codicil—Release.——Where a testator in his will releases all demands against all persons "named in this will," and afterwards makes a codicil in which against whom testator had demands is named, such codicil does not so form a part of the will as to release that person.—*Sloane v. Stevens*, N. Y. Ct. App., Oct. 11, 1887; 13 N. E. Rep. 618.

142. WILL — Fraud — Undue Influence. —— Circumstances stated in detail, which taken together, are held not to constitute sufficient evidence of fraud or undue influence of son in procuring the execution of his mother's will.—*Brick v. Brick*, N. J. Prerog. Ct., Oct. 25, 1887; 10 Atl. Rep. 869.

143. WILL—Legacy—Restraint of Marriage.——A bequest upon condition, that the legatee shall remain unmarried till she is twenty-one years of age, is valid.—*Reuff v. Coleman*, S. C. App. W. Va., Sept. 23, 1887; 3 S. E. Rep. 597.

144. WILL —Trust—Precatory Trust.——A will containing a devise to a wife with a request, and "only as a request," that she provide for the children if, etc., does not create a precatory trust in favor of the children.—*Sale v. Thornsberry*, Ky. Ct. App., Oct. 20, 1887; 5 S. W. Rep. 468.

145. WILL—Undue Influence.——Where one procures the execution of a will in his own favor by a person infirm in mind and body and of advanced age with manifest purpose to exclude from the consideration of the testatrix, such wills procured by undue influence, and the burden of proving capacity rests upon proponent.—

Waddington v. Busby, N. J. Prerog. Ct., Oct. 18, 1887; 10 Atl. Rep. 862.

146. WILL — Widow — Renunciation — Homestead.——Where a widow elects to renounce the provision of the will for her benefit, and to take the homestead and her distributive share instead, a devise of the homestead to another fails, and the doctrine of election and satisfaction does not apply.—*Gainer v. Gates*, S. C. Iowa, Oct. 25, 1887; 34 N. W. Rep. 798.

147. WITNESS—Deceased Person.——In an injectment suit, a party is a competent witness to testify as to the good faith of a deceased person who had assigned to him a bond upon which he had obtained judgment and execution and rested his claim to title thereon.—*Adams v. Bleakley*, S. C. Penn., October, 1886; 10 Atl. Rep. 884.

148. WITNESS—Fees.——One who is a witness in a federal court and at the same time a grand juror, is only entitled to his fees as witness from and after his discharge as a grand juror.—*Ex parte Turner*, U. S. D. C. (S. Car.), September, 1887; 32 Fed. Rep. 372.

149. WITNESS—Handwriting—Cross-examination.——Where a party prosecuted for illegally writing names on the registration book testifies that he did not do so, he may, on cross-examination, be required to write the names, which writing the jury may compare with the registration book.—*United States v. Mullaney*, U. S. C. C. (Mo.), Sept. 20, 1887; 32 Fed. Rep. 370.

150. WITNESSES — Opinions — Foundation.——A witness, who has knowledge of the material facts and their surroundings, may give his opinion by showing the reason for it, whether he be an expert or not.—*Killian v. Augusta, etc. R. R. Co.*, S. C. Ga., March 25, 1887; 3 S. E. Rep. 621.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERY NO. 31.

A, B and C are first, second and third attaching creditors. At the time A's attachment issued his debt, in fact, was not due, although his affidavit and petition both allege that it was due. What is the best method of procedure under Kansas code for B and C to attack A's claim and his priority? S.

QUERY NO. 32.

We are told that Henry II., in a moment of anger with Thomas A. Becket, once exclaimed: "Is there no one of my subjects who will rid me of this insolent priest?" Whereupon some of the king's followers, who had stood by and heard the remark, plotted the archbishop's death, lay in wait for him, and finally accomplished the wish and purpose of King Henry's sudden passion. Now, presuming that the killing of the archbishop was such in fact as would amount to murder, would the king, as the cause or accessory before the fact, be as one guilty of murder, likewise? Is it possible that the mere passionate words should deserve greater punishment than would have been visited upon the king—setting the protection of royalty aside—had he, instead of the mere angry words, in anger struck the fatal blow? If this is possible, what becomes of the theory of *intent*? In the above case, it must be supposed, of course, that the king did not have time and opportunity to attempt to check the act he had set in motion before its final commission.

A. K.

Answer. This is not a legal question and we publish and answer it only *ex gratia*. If we may suppose, as the question assumes, that the king was amendable to the criminal law, the question propounded is one of fact for the jury, who, if they believed from all the facts and circumstances of the case, and the relationship of the parties to each other, as sovereign and subjects, that the king intended and expected that his words should be interpreted by those who heard them as a command or license for them or any other persons to slay the cardinal, they might well convict him as accessory before the fact. Otherwise, the jury must regard the words as a mere ebullition of anger and irritation.

QUERIES ANSWERED.

QUERY NO. 30. [*25 Cent. L. J. 528.*]

1. A and B are husband and wife. A and B transfer their property to C by warranty deed without consideration. C was to convey property at their demand. A has committed adultery. B refuses to live with A but does not want to get a divorce. Can B petition the court and have the property decreed to her for her sole and separate use and so she can convey it by her own deed? The property was purchased by A with money which B had at their marriage in the name of A and with no understanding whether it should be for B's sole and separate use or not. 2. In above case, can A and B contract between themselves so that B may convey said estate by her own deed? This is a Missouri case. Cite authorities. M. & M.

Answer. We know of no law by which B, who refuses to live with A, can obtain any provision out of his estate for her support. By applying for a divorce she can obtain the necessary alimony. The money which B had at her marriage became the property of A. Woodford v. Stephens, 51 Mo. 443. Equity will not treat this land as hers. Kidwell v. Kirkpatrick, 70 Mo. 214. She cannot under any circumstances convey any land by deed without A's joining in the deed. Martin v. Colburn, 88 Mo. 229. If A and B were married after the passage of the act of 1875 (Rev. Stat. Mo. p. 559, § 3295), then the money remained the property of B, there is no sufficient evidence of a gift of it by her to A (Rieper v. Rieper, 79 Mo. 352), and she can go into equity to have the title vested in her. 1 Pom. Eq. Juris. §§ 52, 53; Rieper v. Rieper, *supra*; Martin v. Colburn, *supra*. In that case she can have this property set apart for her benefit, she receiving the income. 1 Rev. Stat. Mo. p. 558, § 3292.

QUERY NO. 29 [*25 Cent. L. J. 504.*]

Water-works owned by private company; fire occurs in the city; manager in charge at office in the city away in the country; engineer absent from his post in the woods; no water to extinguish the fire; large loss over indemnity by insurance company. Can the water-works company be sued successfully by any tax-paying citizen who sustained loss, or is the city liable? What would be the measure of damages? Please cite authorities from Missouri, if possible. O.

Answer. A city is not liable for damages occasioned by the carelessness or mismanagement of employees in its fire department, while in the ordinary discharge of their duties, nor by defectiveness or insufficiency of machinery used in extinguishing fires. Heller v. Sedalia, 53 Mo. 159; McKenna v. St. Louis, 6 Mo. App. 320. There is no liability on the city. There is nothing stated in the query to show any duty or any

liability in the premises on the water-works company. B.

Another Answer. Action will not lie against the water company, because there is no privity of contract between it and the property owner. Davis v. Clinton Water Works Co., 54 Iowa, 59; Nickerson v. Bridgeport Hydraulic Co., 46 Conn. 24; s. c., 33 Am. Rep. 1. Nor will an action lie against the city. Vanhorn v. City of Des Moines, 63 Iowa, 447. E. M.

RECENT PUBLICATIONS.

REMINISCENCES OF JEREMIAH SULLIVAN BLACK. By Mary Black Clayton. St. Louis: Christian Puby lishing Company. 1887.

This is a tribute by loving hands to the memory of one of the purest, ablest and most distinguished jurists that have ever graced American annals. Of Judge Black's political services it is hardly within our province to speak, except to say that in discharging the duties of high official positions he was actuated by the same purity of motive, devotion to duty and disregard of all personal or selfish considerations that characterized his conduct in all affairs, public or private, of great or little moment, throughout a long and useful life.

Judge Black's character as lawyer and judge is well-known to the profession, and no difficulty can be found in assigning to him a high place in the front rank of those who have been honored for their ability, learning and worth upon the bench and at the bar.

This work, however, is designed rather to commemorate the private virtues of the eminent jurist than his public services, and will be read with much interest by all who would fain keep green the memory of the good who have gone to their reward.

A PRACTICAL TREATISE ON THE LAW OF COVENANTS FOR TITLE. By William Henry Rawle, LL.D. Fifth Edition. Revised and Enlarged. Boston: Little, Brown & Co. 1887.

This is the latest (fifth) edition of a standard work well-known to the profession on a subject of permanent importance in the law of real property, prepared, revised, enlarged and brought down to date by an author of acknowledged learning and ability. A very slight examination of the book will suffice to satisfy anyone that the work has been faithfully done by the author, and that he has left no room for criticism of his methods or arrangement.

Having said this much for the volume, we need hardly add that we very heartily commend it to the consideration of the profession.

ANNOTATED OHIO CODE OF CIVIL PROCEDURE. By W. H. Whitaker, of the Cincinnati Bar, Editor of Whitaker's Smith on Negligence. Cincinnati: W. H. Anderson & Co. 1887.

This is a neat little volume, hymn-book size, which we have no doubt will prove very useful and convenient to practitioners in Ohio and all others who have occasion to be fully informed on subjects connected with the statute law of Ohio, and the construction which has been put upon it by the courts of that State. A very slight examination will satisfy anyone that it is a volume which every lawyer practicing in Ohio courts ought always to carry in his pocket, and to which he will daily, almost hourly, have occasion to refer. The arrangement of the matter is excellent, and Mr. Whitaker deserves the thanks of every one who practices law in the courts of Ohio.

JETSAM AND FLOTSAM.

PRECISE.—The lawyer of whom the following anecdote is related described as so remarkably loose-jointed that his head bobbed from side to side as he walked, while his legs were always twisted around each other while he was sitting. He made up for this physical peculiarity, however, by the extreme precision of his mental processes.

One day a boorish client entered his office and found him writing. The stranger took a seat, and after informing the lawyer that he had come to consult him on a matter of some importance, observed, "My father died and made a will."

"You say," remarked the lawyer, writing steadily, "your father died and made a will."

"Yes, sir, my father died and made a will."

"Humph!" still writing and paying no attention.

"I say, Mr. Call, my father died and made a will."

"Very strange!" writing and not noticing his client.

"Mr. Call, I say again," taking out his purse and placing a fee on the table, "my father made a will and died."

"Oh, now we may understand each other," said the lawyer, all attention, "your father made a will before he died. Why didn't you say so at first? Well, now, go on, let's hear."

INFLUENCING A JUDGE.—The poet Milnes had a mind of penetrating sagacity and brilliant intuitions. He was one day told, by a friend, of the grief of a poor laundress, whose little boy had wandered off to a common near London, and there, with another lad, mounted an old horse grazing there, and taken a ride, only to be arrested for horse-stealing. The laundress had engaged counsel for her son, but was in great doubt as to the issue of the case. When the matter was suggested to Milnes, his fertile mind was at once ready with an expedient.

"How old are the boys?" he asked, and was told that they were about eleven.

"Then," said he, "tell the laundress to take care that they both appear at the trial in nice clean pinafores."

The effect was almost magical. The two little boys, in their nice pinafores, appeared in the dock, and smilingly gazed around the court.

"What is the meaning of this?" asked the judge, who had read the deposition, and now came under the spell of the pinafores.

"A case of horse-stealing, my lord."

"Stuff and nonsense!" said his honor, with indignation. "Horse-stealing, indeed! The boys stole a *ride!*"

Then the pinafores had almost an ovation in court, and all who had to do with the prosecution were obliged to suffer from the judge's indignant comment.

EMPTY WORDS.—A member of the Irish house of commons, who was a fluent but vapid talker, was making an interminable speech against a bill which Curran defended. The Speaker at last reminded him that his time had expired.

"Time, Mr. Speaker!" exclaimed Curran. He has long since done with Time. He is now trenching on eternity!"